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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946 47

No. 745 14

CENTRAL GREYHOUND LINES, INC., OF NEW YORK, APPELLANT,

vs.

CARROLL E. MEALEY, JOHN F. HENNESSEY AND JOSEPH M. MESNIG, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED DECEMBER 5, 1946.

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEB. 7, 1947.

—8955

[fol. 1]

IN COURT OF APPEALS OF NEW YORK

CENTRAL GREYHOUND LINES, INC., of New York, Petitioner,

vs.

CARROLL E. MEALEY, JOHN P. HENNESSEY, and JOSEPH M. MESNIG, constituting the State Tax Commission of the State of New York, Respondents

STATEMENT UNDER RULE 234

This is a proceeding initiated under Article 78 of the Civil Practice Act and the applicable provisions of the Tax Law to review a determination by the State Tax Commission. The proceeding was instituted by the service of a petition and notice of motion on the 17th day of February, 1943. The answer and return of the respondents was filed and served on February 23, 1943.

The Supreme Court, Albany County, by an order granted February 26, 1943, and thereafter filed in the Office of the Clerk of the County of Albany, ordered the proceeding transferred to the Appellate Division, Third Department, for disposition, pursuant to Section 1296 of the Civil Practice Act.

The Appellate Division, Third Department, unanimously affirmed the determination of the State Tax Commission by an order of affirmance dated September 13, 1943, and entered in the Office of the Clerk of the Appellate Division on November 13, 1943.

The Appellate Division, Third Department, denied leave [fol. 2] to appeal to the Court of Appeals by an order entered in the Office of the Clerk of the Appellate Division on January 14, 1944.

The Court of Appeals by an order dated March 2, 1944, granted the Appellant leave to appeal to the Court of Appeals.

There has been no change of parties or attorneys except that individual members of the State Tax Commission at the time the proceeding was started have been succeeded by Alger B. Chapman, Spencer E. Bates and Harry E. Clinton.

In Supreme Court of New York, Albany County

Central Greyhound Lines, Inc., of New York, Petitioner,

vs.

Carroll E. Mealey, John P. Hennessey, and Joseph M. Mesnig, constituting the State Tax Commission of the State of New York, Respondents

Order Transferring Proceeding—February 26, 1943

Upon reading and filing the petition of Central Grey- [fol. 3] hound Lines, Inc., of New York, verified the 16th day of February, 1943, and the answer and return of Carroll E. Mealey, John P. Hennessey and Joseph M. Mesnig, constituting the State Tax Commission of the State of New York, duly verified the 23rd day of February, 1943,

Now, on motion of Bond, Schoeneck & King, attorneys for the petitioner and upon the consent of Nathaniel L. Goldstein, Attorney-General of the State of New York, attorney for respondents herein, it is

Ordered, that the proceeding be and the same hereby is, transferred for disposition to a term of the Appellate Division of the Supreme Court in the Third Judicial Department, in accordance with the provisions of Section 1296 of the Civil Practice Act, to the end that the determination of the State Tax Commission herein may be reviewed both upon the law and upon the facts and if said decision and determination and the account audited and stated against the petitioner shall be found to be illegal or erroneous, they may be revised, corrected or annulled by the Court according to law.

Enter:

Harry E. Schirick, Justice of the Supreme Court.

The respondents herein consent to the entry of the within order and waive notice of settlement thereof.

Nathaniel L. Goldstein, Attorney-General.

Dated: February 26, 1943.

[fol. 4] In Supreme Court of New York, Albany County

[Title omitted]

Notice of Motion—February 16, 1943

Please Take Notice that on the annexed petition of Central Greyhound Lines, Inc., of New York, duly verified the 16th day of February, 1943, application will be made to the Supreme Court of the State of New York, at a Special Term thereof to be held at the County Court House in the City of Albany, New York, on the 26th day of February 1943, at the opening of Court on that day or as soon thereafter as counsel can be heard for the review by this Court of the determination of the State Tax Commission of the State of New York, made on or about January 27, 1943, upon an application made to it by Central Greyhound Lines, Inc., of New York, the petitioner herein, for the cancellation or reduction of an assessment made against the petitioner for taxes under Section 186-a of the Tax Law, to the end that a final order may be granted herein annulling such [fol. 5] determination of the State Tax Commission and directing the State Tax Commission to cancel or reduce such assessment in accordance with law together with such other and further relief as may be just and proper.

Dated: February 16, 1943.

Yours, etc., Bond, Schoeneck & King, Attorneys for Petitioner, Office & P. O. Address, 1400 State Tower Building, Syracuse, New York.

In Supreme Court of New York, Albany County

Central Greyhound Lines, Inc., of New York, Petitioner,

vs.

Carroll E. Mealey, John P. Hennessey, and Joseph M. Mesnig, constituting the State Tax Commission of the State of New York, Respondents

Petition—February 16, 1943

The petitioner complaining of the respondents through Bond, Schoeneck and King, its attorneys, respectfully shows [fol. 6] to this Court and alleges as follows:

1. That the petitioner is a corporation organized and existing under and by virtue of the Laws of the State of New York.

2. That the respondents Carroll E. Mealey, John P. Hennessey and Joseph M. Mesnig, form the State Tax Commission of the State of New York.

3. That the petitioner is engaged in business as a common carrier by omnibus and as such is subject to the supervision of the Public Service Commission of the State of New York and that your petitioner operates its said omnibuses both within and without the State of New York.

4. That on June 21, 1940, the respondents notified the petitioner that petitioner was liable for additional taxes pursuant to Section 186-a of the Tax Law. Upon information and belief said additional taxes were assessed upon gross income of the petitioner from sales of transportation services in interstate commerce originating and terminating within the State of New York but consumed and used partly within the States of New Jersey and Pennsylvania.

5. That your petitioner thereafter duly filed with the respondents an application for a hearing pursuant to the provisions of Section 186-a of the Tax Law and the respondents thereafter held such a hearing.

6. That at such hearing your petitioner established by competent proof that said additional tax for the month of [fol. 7] July, 1937, was based upon sales of transportation services in interstate commerce originating and terminating within the State of New York but consumed and used partly within the States of New Jersey and Pennsylvania and that the revenue from such services for the month of July attributable to the mileage consumed in the State of New York was 57.47% of the total revenue received for such services.

7. That regardless of such evidence the respondents refused to cancel or reduce said assessment but affirmed the same by its decision dated January 27, 1943, a copy of which is annexed hereto.

8. That said determination of the commission made January 27, 1943, is contrary to statute, is unconstitutional, and is illegal and erroneous in that any assessment upon income of the petitioner from the sales of transportation services in interstate commerce originating and terminating within the State of New York but consumed and used partly within the States of New Jersey and Pennsylvania

is illegal and void and is not authorized by statute, and said assessment is further illegal and void in that if any portion of said income is subject to tax under Section 186-a of the Tax Law the income from services consumed and used within New Jersey and Pennsylvania must be eliminated therefrom and that the income from such services consumed and used without the State of New York constitutes 42.53% of such income for the month of July, 1937.

[fol. 8] 9. That no previous application for the relief herein asked for has been made.

Wherefore, your petitioner prays that this Court review and annul said determination made by the respondents, that it direct said respondents to cancel said assessment in its entirety or in the alternative reduce the sum by 42.53% and your petitioner further prays that it may have such other, further, and different relief as to the Court may seem just and proper.

Central Greyhound Lines, Inc., of New York, by Robert B. Phillips.

Dated: Syracuse, New York, February 16, 1943.

Duly sworn to by Robert B. Phillips. Jurat omitted in printing.

[fol. 9] In Supreme Court of New York, Albany County

[Title omitted]

Affidavit of Lyle W. Hornbeck in Support of Motion—February 16, 1943

State of New York,
County of Onondaga,
City of Syracuse, ss.:

Lyle W. Hornbeck, being duly sworn, deposes and says that he is an attorney at law associated with the firm of [fol. 10] Bond, Schoeneck & King, attorneys for the petitioner in this proceeding; that petitioner is applying for the relief provided by Article 78 of the Civil Practice Act in order to have reviewed a determination of the State Tax Commission denying petitioner's application to cancel or reduce an additional assessment made against petitioner

for taxes under the provisions of Section 186-a of the Tax Law.

The determiation to be reviewed herein was made as a result of a hearing held and at which evidence was taken; upon information and belief, there will be raised herein the issues stated in Subdivisions 6 and 7 of Section 1296 of the Civil Practice Act. Therefore, deponent believes that it is proper for this Court at a Special Term to make an order directing that the proceedings herein be transferred for disposition to a term of the Appellate Division for the Third Judicial Department.

That no previous application for the relief asked for in said petition has been made.

Lyle W. Hornbeck.

Subscribed and sworn to before me this 16th day of February, 1943.

Edward Johnson, Notary Public.

[fol. 11] In Supreme Court of New York, Albany County

[Title omitted]

Answer and Return

The respondents above named, as and for their Answer and Return herein:

1. Deny the allegations contained — the paragraph of said petition numbered 4 except that they admit that on June 21, 1940, the respondents notified the petitioner that petitioner was liable for additional taxes pursuant to Section 186-a of the Tax Law.

2. Deny that the transportation mentioned in the paragraph of said petition numbered 6 constituted interstate commerce, and deny that the services therein mentioned were partly consumed or used in the States of New Jersey or Pennsylvania.

3. Deny the allegations contained in the paragraph of said petition numbered 8.

4. Allege that the tax described in said petition and affirmed by the Commission's final determination therein [fol. 12] mentioned was lawfully assessed against the petitioner under and pursuant to the provisions of Section 186-a of the Tax Law.

5. Respondents certify that the annexed transcript contains a full and correct record of all of their proceedings subject to review or consideration in this proceeding.

Transcript of Record

1. Tax return of the petitioner under Section 186-a of the Tax Law for the month of July 1937, filed with the State Tax Commission on September 16, 1937.

2. Letter from Edward Schoeneck, Esq. to Department of Taxation and Finance, dated January 8, 1940.

3. Statement of revenue originating and terminating in New York State but passing through Pennsylvania and/or New Jersey en route, received by the State Tax Commission on January 10, 1940.

4. Statement of account for an added assessment against the petitioner under Section 186-a of the Tax Law for the month of July 1937, forwarded by the State Tax Commission to the petitioner on June 21, 1940.

5. Petition for hearing filed by the petitioner with the State Tax Commission on July 8, 1940.

6. Transcript of proceedings had and testimony taken at a formal hearing held at the office of Department of Taxation and Finance, City of Albany, N. Y. on October 20, 1942, upon said application for a hearing.

[fol. 13] 7. Table entitled "Receipts from Interstate Business which Originates and Terminates in New York State," being Exhibit A upon said hearing.

8. Final determination of the State Tax Commission upon said application for hearing dated January 27, 1943, and on that date forwarded by the State Tax Commission to the petitioner.

Wherefore, Respondents pray that an order may be made directing that all proceedings herein be transferred for disposition to the Appellate Division of the Supreme Court in and for the Third Judicial Department.

Nathaniel L. Goldstein, Attorney-General of the State of New York, Attorney for Respondents, Office and Post Office Address; The Capitol, Albany, N. Y.

Duly sworn to by Joseph M. Mesnig. Jurat omitted in printing.

[fol. 14] EXHIBIT 1

Page 1 of Return

Form 10 C. T.

10 C. T. 6-23-37-10,000 (3-9278)

Receipt Stamp File No.

Taxpayer's Bracket

Check

Amount of remittance by Money Order $1,472.45

Bank Draft

Place X opposite form of remittance

This Space for Name and Address

5-19-25-NY

File this return not later then the 25th of the month following that for which the report is made.

Central Greyhound Lines, Inc. of N. Y., 701 Hiawatha Blvd., Syracuse, N. Y.

Make checks payable to the State Tax Commission.

[fol. 15] EXHIBIT 1

STATE OF NEW YORK, DEPARTMENT OF TAXATION AND FINANCE
ALBANY, N. Y.

Return by Utilities of tax on gross income, Article 9 Section 186-A of the Tax Law.

Utilities doing business in this State which are subject to the supervision of the State Department of Public Service.

Month of July, 1937.

A. State kind and class of business Bus transportation

B. State whether taxpayer is a corporation, co-partnership, individual, etc. Corporation.

C. If corporation, give date and place of incorporation, May 19, 1925.

D. If business was begun or discontinued since July 1, 1937, state which and give data

E. Are the books kept on a cash or an accrual basis?
Accrual basis.

F. The books of the taxpayer are in care of R. B. Phillips, Comptroller, 701 Hiawatha Boulevard, Syracuse, New York.

TAX COMPUTATION

42. Gross income taxable—forward	$73,622.67
50. Tax at 2% of item 42	1,472.45
51. Penalty	
52. Total Tax and Penalty	1,472.45

[Fol. 16] SCHEDULE D

Detail of Lines 10, 14 and 21

Other Sales or Services; Other Miscellaneous Revenue; All Other Income

Description		Amount
Income from Parcel Checking, Miscellaneous Station Privileges and Services Rendered		5,756.72
Rental from Equipment	972.99	
Sub-lease Rental Income	350.00	
Guaranteed Route Revenue	1,717.05	
Purchase Discounts and Miscellaneous	469.34	3,509.38

Page 2 of Return

GROSS INCOME

Sales and Service Op

Sales and Service Operating Revenue

1. Gas
2. Electricity
3. Steam
4. Water
5. Refrigeration
6. Telephone and Telephony
7. Telegraph and Telegraphy

8. Railroads (street surface, rapid transit, subway and elevated)	
9. Omnibus	474,958.35
10. Other sales or services (specify in Schedule D)	
Miscellaneous Revenue	
11. Commission	11,801.83

[fol. 17]

12. Merchandise and jobbing, including installment and conditional sales and rental contracts	
13. Advertising	
14. Other Miscellaneous Revenue, including sales of residuals and by-products (specify in Schedule D)	5,756.72
Other Income	
15. Interest	64.35
16. Dividends	
17. Royalties	
18. Profit from sales of securities	
19. Profit from sales of real property	
20. Profit from sales of personal property	
21. All other, including profits on sales, services, rents, etc. not reported above (specify in Schedule D)	3,509.38
22. Total Gross Income	496,090.63

DEDUCTIONS OF NON-TAXABLE INCOME

Sales and Service Operating Revenue	
30. From sources without State—Schedule E	
31. From other distributors within the State—Schedule F	404,471.81
32. From customer resales—Schedule G	
Miscellaneous Revenue—Schedule H	
33. From sources without the State	14,952.78
34. From others who purpose to resell	

[fol. 18]

Other Income—Schedule I

35.	Interest from U. S., State and other tax exempt securities	
36.	Interest from sources without the State	54.80
**37.	Interest from affiliated companies	
38.	Dividends from sources without the State	
**39.	Dividends from affiliated companies	
40.	Other permissible income deductions	2,988.57
41.	Total deductions	422,467.96
42.	Gross income taxable	73,622.67

** Only where a majority of voting stock is owned by taxaper reporting.

Page 3 of Return

DETAIL OF DEDUCTIONS SHOWN ON LINES 30 to 40 INC.

Sales and Service Operating Revenue

Schedule E—Line 30
Sources Without the State

Name of Purchaser	Address	Place of Delivery	Amount
Operating Revenue Earned in	Interstate Commerce	and without the State	404,471.81

[fol. 19]

Schedule F—Line 31
Other Distributors

Name of Purchaser	Address	K. W. H. or Other Quantity Delivered	Amount

Schedule G—Line 32
Customer Resales

Name of Purchaser	Address of	Month or Other Quantity Resold	K. W. H.	Amount

MISCELLANEOUS REVENUE
Schedule H—Lines 33 and 34

Description	Amount
Commissions and Station Income from locations without the State	14,952.78

[fol. 20] OTHER INCOME
Schedule I—Lines 35 to 40

Nature of Income (Interest, dividends etc.)	Name of Payer	Proportion of Voting Stock Owned	Amount
Miscellaneous Interest Earned Outside the State			54.80
Portion of Miscellaneous Income that was earned outside the state			2,988.57

STATE OF NEW YORK,
County of Onandaga, ss:

F. W. Gelke, Ass't Treasurer (If Corporation, give title of Office) of Central Greyhound Line, Inc. of New York (Name of firm, association or corporation) being duly sworn deposes and says that this return is to the best of his

knowledge and belief true and correct in every particular and that he is familiar with the details of the business herein covered and with the original books, papers and records from which this return was prepared.

F. W. Celke (Signature of affiant).

Sworn before me this 13th day of September, 1937. Ethel M. Burnham (Signature of officer administering oath), Notary Public (Title). (Seal.)

[fol. 21] EXHIBIT 2

BOND, SCHOENECK & KING
1400 State Tower Building
Syracuse, N. Y.

January 8, 1940.

Department of Taxation and Finance
Corporation Tax Bureau
Albany, New York

Re: Central Greyhound Lines, Inc. of New York
Your File No. 610104—Mr. Kent

Gentlemen:

We enclose a statement showing revenue of Central Greyhound Lines, Inc. of New York, originating and terminating in New York but passing through Pennsylvania and/or New Jersey, enroute. This information is furnished to you pursuant to your demand and under protest. It is in no way to be considered a concession or admission that such receipts or any part thereof are taxable under the provisions of Section 186a of the Tax Law.

We call your attention to the fact that this revenue is not allocated to show that portion of the gross receipts applicable to the mileage within the State of New York.

Very truly yours,

(S.) Edward Schoeneck.

LWH:EFS
enc.

[fol. 22] EXHIBIT 3

CENTRAL GREYHOUND LINES, INC. OF NEW YORK

REVENUE ORIGINATING AND TERMINATING IN NEW YORK STATE BUT PASSING THROUGH PENNSYLVANIA AND/OR NEW JERSEY ENROUTE

July — 1937		$ 84,412.31
Aug.	"	88,910.45
Sept.	"	69,838.81
Oct.	"	44,129.26
Nov.	"	33,358.83
Dec.	"	32,312.99
Total		$ 352,962.65
Jan. — 1938		$ 26,881.84
Feb.	"	23,179.53
Mar.	"	26,021.64
Apr.	"	44,084.23
May	"	46,199.49
June	"	54,933.63
July	"	93,949.17
Aug.	"	110,835.21
Sept.	"	93,432.59
Oct.	"	57,327.27
Nov.	"	51,793.01
Dec.	"	49,442.51
Total		$ 678,080.12

[fol. 23]

Jan. — 1939		$ 38,444.36
Feb.	"	32,276.55
Mar.	"	38,543.63
Apr.	"	58,331.34
May	"	66,185.17
June	"	84,878.72
July	"	130,092.53
Aug.	"	138,071.94
Sept.	"	104,914.79
Oct.	"	65,180.08
Nov.	"	42,942.55
Total		$ 799,861.66
GRAND TOTAL		$1,830,904.43

EXHIBIT 4

DEPARTMENT OF TAXATION AND FINANCE,
ALBANY, N. Y.
27 CT.

CORPORATION TAX BUREAU.

Notice of Assessment and Receipt
186-A Additional Tax on Utilities

Notice is hereby given that there has been assessed against you the amount set forth below as an additional tax under Section 186-A of the Tax Law, based on the period shown below measured by gross income or gross operating [fol. 24] income at the rate of 2%. Any balance due is payable at once. Certified checks should be made payable to and forwarded to State Tax Commission, Albany, N. Y., with this form if there is a balance due. If no balance due this constitutes a receipt. No charges are considered paid until check is satisfied.

Tax Item Description	Amount
Report July 1937	1688.24
Added Assessment	
Less Payment Accompanying Report	
File Number	
Date of Assessment	
Refer To 6 21-40	Balance Due 1688.24

Received Payment

Central Greyhound Lines Inc of N. Y. 610104
701 Hiawatha Blvd.
Syracuse, N. Y.

[fol. 25]

EXHIBIT 5

PETITION

State of New York—Department of Taxation and Finance

In the Matter of The Application of CENTRAL GREYHOUND LINES INC. OF NEW YORK, for a Hearing Pursuant to Section 186-a-6 of the Tax Law

The petition of Central Greyhound Lines Inc. of New York respectfully shows:

1. That it is an omnibus corporation duly organized under the laws of the State of New York, having its principal office at Syracuse, New York and engaged in the operation of omnibus lines both within and without the State of New York.

2. That on June 21, 1940 the Department of Taxation and Finance notified the petitioner that it was liable for additional taxes in the sum of Thirty-six Thousand Six Hundred Eighteen Dollars ($36,618.00) pursuant to Section 186-a of the Tax Law. That copies of such notices are annexed hereto.

3. Upon information and belief, said additional taxes are assessed upon gross income of the petitioner from sales

of transportation services in interstate commerce originating and terminating within the State of New York, but consumed and used partly within the States of New [fol. 26] Jersey and Pennsylvania. Any assessment upon such income is not authorized by statute and is illegal and void; said assessment includes taxes which cannot be lawfully demanded or collected.

4. Said assessment is further illegal and void in that if any portion of said income is subject to taxation under Section 186-a of the Tax Law, the income from services consumed and used within the States of New Jersey and Pennsylvania must be eliminated therefrom and that the income from such services consumed and used without the State of New York constitutes over 50% of such income.

Wherefore, the petitioner respectfully asks for a hearing before the Tax Commission, pursuant to the provisions of Section 186-a-6 of the Tax Law, and that the Tax Commission cancel or reduce such illegal assessment.

Central Greyhound Lines Inc. of New York, by Fred W. Celke.

STATE OF NEW YORK,
County of Onondago,
City of Syracuse, ss:

Fred W. Celke, being duly sworn, deposes and says: That he is Asst. Treas. of Central Greyhound Lines, Inc. of New York, the petitioner named in the foregoing petition; that he has read the foreg-ing petition and knows the contents thereof; that the same is true to his own knowl- [fol. 27] edge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Fred W. Celke.

Subscribed and sworn to before me this 6th day of July, 1940. Howard H. Cannon, Notary Public.

"Annexed to the original petition are copies of the notices referred to in paragraph 2 of the foregoing exhibit covering the period from July 1, 1937 through November 30, 1939. The notice for the month of July, 1937, is printed above as Exhibit 4. The other notices are upon the same form but cover different dates and amounts."

[fol. 28] EXHIBIT 6

State of New York—Department of Taxation and Finance

In the Matter of the Application of CENTRAL GREYHOUND LINES, INC., OF NEW YORK, for revision of Taxes assessed under Section 186-A of Article 9 of the Tax Law

Formal Hearing held at the office of the Department of Taxation and Finance, Corporation Tax Bureau, Albany, N. Y., on the 20th day of October, 1942.

Present for State Tax Commission—Joseph M. Mesnig, Tax Commissioner. E. W. Burton, Deputy Director, Corporation Tax Bureau. Harry C. Moody, Corporation Tax Administrative Supervisor, Corporation Tax Bureau. Chester A. Kent, Tax Examiner, Corporation Tax Bureau.

APPEARANCES:

For Central Greyhound Lines, Inc. of New York—Edward Schoeneck, Lyle W. Hornbeck, of Counsel, Bond, Schoeneck & King, 1400 State Tower Building, Syracuse, N. Y.

[fol. 29] Robert B. Phillips, Comptroller.

Com. Mesnig: I understand the issues are first, whether Section 186-A is intended to apply to a tax on the sales of bus transportation by this corporation from points originating in and terminating in the State of New York but traversing outside the State during some portion of the journey, and second, if it does, whether or not the receipts should be [illegible]rated according to the mileage in and out of the State.

Mr. Hornbeck: Correct.

Com. Mesnig: It is stipulated that your proof will relate to your operations for the month of July, 1937, but that the judicial result will be applied to all the assessments to date, for which applications for revision have been filed.

Mr. Hornbeck: Correct.

MR. ROBERT B. PHILLIPS, duly sworn by Commission-Mesnig, testified as follows:

By Mr. Hornbeck:

Q. Mr. Phillips, your full name is Robert B. Phillips?

A. That is correct.

Q. You live in Syracuse, N. Y.?

A. I do.

Q. What is your connection with Central Greyhound Lines, Inc. of New York?

A. I am the Comptroller.

Q. And your office is located at Syracuse, N. Y.?

A. That is correct.

[fol. 30] Q. And as comptroller do you have charge of all of the records of this corporation?

A. I do.

Q. Showing the revenues received and the type of services that produced that revenue?

A. Yes, sir, I do.

Q. What is the basic record that you keep?

A. The basic record, of course, is the ticket itself that is sold by the agent. The ticket is sold in accordance with tariffs published and filed with the New York State Public Service Commission and the Interstate Commerce Commission. The tickets are lifted from the passenger by the drivers on the various trips. The drivers list the tickets on the trip report. The trip report shows the bus number, the driver's name, the miles operated, the origin and destination of the ticket, and the portion of the haul or route that the ticket holder makes on the particular trip. As an example, a ticket might be sold from Buffalo, N. Y., to Miami, Florida. The particular trip under our jurisdiction would be from Buffalo, N. Y., to New York City only, where the passenger would change onto another bus line. Our trip report would have recorded upon it by the driver or the various drivers along the route that portion of the haul between Buffalo and New York City.

Q. These trip reports are then collected and information is drawn from them on your records?

A. We draw all types of statistical and financial information from them. We compute the dollars and cents value of the total ride of any one passenger over our routes. We set forth the mileage that this particular pas-[fol. 31] senger has traveled, and on the trip report we set

forth the mileage the passenger might have traveled wholly intrastate business within the State of New York, purely local business. We also set forth on the trip report the mileage that the passenger might have traveled of wholly intrastate business in any other state through which we operate, such as Pennsylvania or Ohio. Due to this—what shall I call it—indefiniteness in regard to searching 186-A of the New York Tax Law, we have also provided space and means on our trip report to set forth the haul or ride of a passenger that originates and terminates in New York State but passes through other states en route. Then also from information on the trip report we code and compute mileage traveled by passengers in wholly interstate rides, that is, rides that originate in New York State and terminate outside the State, or vice versa.

Q. At the end of a particular month you take these trip reports and you prepare statements showing the total amount of interstate revenue received for that particular month. Is that correct?

A. Well, we don't set the interstate revenue out as such.

Q. You show, first, the total amount of intrastate revenue.

A. We show, first, the total amount of revenue of all sources and descriptions. We segregate that into intrastate revenue in New York State, intrastate revenue in other states, and interstate revenue under consideration under Section 186-A which originates and terminates in New [fol. 32] York State although passing through other states en route. The total of those three different types of revenue I have just named—intrastate in New York State, intrastate in other states, and interstate under consideration under Section 186-A—is subtracted from the total revenue, and through that means we arrive at the interstate revenue originating in New York State but terminating outside New York State or vice versa. Now, our trip reports do contain the data, the statistics, and the information from which we can pull together that last type of intrastate revenue, if we desired, but we don't need it for any particular purpose, so we have never drawn it together. We figure through this method of deductions we are arriving at the figure which will be just as accurate as though we had gone through all the extreme detail of tying it together through individual tickets.

Q. Have you prepared for the month of July, 1937, a statement showing the total amount of revenue from inter-

state business which originates and terminates in New York State?

A. I have—under my supervision.

Q. May this be marked for identification?

Com. Mesnig: Received for identification and marked Exhibit "A".

(Statement—4 pages—headed "Central Greyhound Lines, Inc. of New York—Receipts from Interstate Business Which Originates and Terminates in New [fol. 33] York State—Month of July, 1937" received for identification and marked Exhibit "A")

Q. And is Exhibit "A", marked for identification, such a statement as you have just described?

A. It is; yes, sir.

Q. And is this taken from the original records of the corporation which you have described?

A. It has been; yes, sir.

Q. And those records are kept in the ordinary course of business?

A. Yes, sir. They are on file in the Syracuse office of the corporation.

Q. Now, will you tell us what Exhibit "A" shows?

A. Exhibit "A" shows a resume of the detail of tickets lifted by our drivers and recorded on our trip reports, these tickets having originated and terminated in New York State but have passed en route through other states. On pages 1, 2, and the upper half of 3 we show the city of origin or destination of traffic between the cities named and New York City, or between New York City and the cities named. This data as compiled shows the traffic in either direction. For instance, from Buffalo to New York City, or from New York City *of* Buffalo. The total business in the month of July, 1937, in both directions of this nature under consideration under 186-A is included in this figure of $19,479.85. The figures in the second column, which is marked "(1) To New York City", show the miles between the city or village in the left hand column to New York City or from New York City to the city or village. The figure in the third column, that marked "(2)" at [fol. 34] the top and headed "Within New York State," shows the mileage wholly within New York State on this particular trip. The figure in the fourth column, headed

"Per cent of (2) to (1)" shows the percentage of the miles wholly within New York State to the total miles between New York City and the origin or destination in the left hand columns. Under the two columns headed "Interstate Revenue", the left hand column, the first column, is headed "Total" and in this column is shown the total revenue from interstate commerce under consideration under Section 186-A here between the point or city or village indicated in the left hand column and New York City, or vice versa. The last column on the right hand side of the page, headed "Within New York State" indicates or shows a figure arrived at by applying the percentage figure in the fourth column to the total figure in the fifth column. On the bottom part of page 3 of the Exhibit we have origins and destinations shown; as an example, Pt. Allegany to E. Aurora, and from that point down. Those figures in the various columns opposite these origins and destinations on the bottom part of page 3 and on page 4 reflect the same information as I have just indicated for the destinations on pages 1, 2 and the bottom half of page 3. Now, Pt. Allegany is outside of New York State. In fact, it is in Pennsylvania. East Aurora is in New York State. All of the cities in the left hand column on page 3 are outside of New York State. In fact, both Scranton and Pt. Allegany are in Pennsylvania, but the destinations are in New [fol. 35] York State. We have shown these origins and destinations due to the fact that a ticket might be sold to a passenger from New York City or East Aurora. That passenger no doubt took our New York-Cleveland, Ohio, trip, and had to change buses at Pt. Allegany. The ticket as sold out of New York City was probably sold in two tears; that is, one tear reading "From New York City to Pt. Allegany", and the other tear reading "From Pt. Allegany to East Aurora". Now that original tear, from New York City to Pt. Allegany, would be listed by the driver on our New York City-Cleveland bus, whereas the tear from Pt. Allegany to East Aurora would be listed by another driver, and the information in connection with the complete haul would therefore be recorded on two separate trip reports. So in order to get that complete haul into our picture I show the information as recorded.

Com. Mesnig: Where do you get the haul from New York City to Pt. Allegany, then, or where do you show that?

A. You mean the portion of the haul?

Com. Mesnig: From New York City to Pt. Allegany.

A. That would be down here (indicating).

Com. Mesnig: I see it. Pt. Allegany is one of the cities or villages listed on page 1.

A. That is right. There is a 5.6 miles haul from the Tunnel of New York to the bus terminal in New York City recorded there under the second column opposite Pt. Allegany on page 1. That would account for the balance of that [fol. 36] haul. The total figure shown in the fifth column under interstate revenue on page 4, $84,412.31, reflects the total interstate to revenue for the month of July, 1937, originating and terminating in New York State but passing en route through other states. The amount of $48,508.97 reflects a total of the portion of that revenue whose ride was wholly within New York State.

Mr. Burton: That is computed on the basis of exact mileage traveled in New York State on those particular trips.

A. As compared to the total miles on the particular trip; yes, sir.

Mr. Hornbeck: We have no other proof on this question.

Com. Mesnig: Do you want to offer this in evidence?

Mr. Hornbeck: I offer it in evidence; yes.

(Statement, which was received for identification and marked Exhibit "A", placed in evidence.)

By Com. Mesnig: Mr. Phillips continuing to testify.

Q. Mr. Phillips, the Central Greyhound Lines, Inc., of New York, is a corporation subject to the jurisdiction of the Public Service Commission?

A. Yes, sir.

Q. Now, as to the preparation of Exhibit "A", I understand that is not made from an actual examination of all the tickets sold during the month of July, 1937.

A. Yes, sir, it is made from an examination of all tickets [fol. 37] sold whose ride originates and terminates within New York State but passes en route through other states. It has taken into consideration every individual ticket for the month of July.

Q. I understand your explanation, then. I thought you said that it was made by taking the figures showing total

interstate receipts and subtracting total intrastate receipts to show this difference.

A. No. This figure is computed by taking each individual ticket that is sold whose origin and destination are within New York State, but whose ride passes through another state en route. This other figure of interstate business, with which I think you are a little confused, is the interstate business originating in New York State but terminating outside of the State. That latter interstate business is arrived at through taking our total revenue for all tickets and deducting from that our intrastate revenue in the various states and this type of interstate revenue under consideration under Section 186-A.

Mr. Burton: Was none of that type of straight interstate business included in this Exhibit?

A. No, sir. As an example: In our tax reports under this section there is under Schedule E a figure which shows the operating revenue earned in interstate commerce and outside the State of New York. Now, that interstate revenue includes the type of revenue under consideration under 186-A.

(Discussion off the record.)

[fol. 38] Q. Referring to page 1 of Exhibit "A", Mr. Phillips, what would be the route that the bus would follow in proceeding from Buffalo to New York City.

A. This particular route runs from Buffalo to Batavia, to Mt. Morris, Dansville, Hornell, Elmira, then to Tonawanda, Pa., then into Scranton and through New Jersey to the Tunnel and into New York City.

Q. Is that a through ride; that is, one bus makes that trip?

A. Yes, sir. One bus makes the trip.

Q. And a passenger desiring to make that trip would buy a ticket in Buffalo marked "Buffalo to New York City"?

A. That is correct.

Q. And the gross receipts from those trips during the month of July, 1937, represents the $19,479.85, shown on Exhibit "A"?

A. Yes; in both directions.

Q. All of your entrances and exits from New York City are through New Jersey by way of the Holland Tunnel?

A. Yes, sir; they are. Well some of them are now through the Lincoln Tunnel, but through New Jersey and through the Lincoln or Holland Tunnel.

Q. And that accounts for the large number of cities which in this Exhibit are related to trips to New York City?

A. Yes, sir.

Q. And in all cases a ticket is sold from the particular city that may be shown in the left hand column of Exhibit "A" to New York?

A. Or vice versa. Yes, sir.

Q. Or vice versa.

[fol. 39] Mr. Kent: Where you have a Pennsylvania and New Jersey city here, that is where there is a stop-over?

A. Yes, sir.

Mr. Kent: From a New York City point to a New York State point up-state?

A. That is correct.

Mr. Kent: In other words, those are all through trips.

A. Yes, sir. For instance, if we sold a ticket from Jersey City, N. J., into New York City, it would not be reflected in this report. The only reason Jersey City is reflected here is because a ticket was sold at some New York State point, and the passenger stopped over in Jersey City and took another one of our busses on into New York City, and the two portions of the ride were recorded on two different trip reports.

Q. But the transportation was all sold on a single ticket?

A. That is correct, although the ticket might have been in more than one tear. By a tear I mean a portion of a ticket. For example, if the passenger originated, let us say, in Binghamton, N. Y., destined to New York City, we could have sold that passenger a ticket in one tear, one piece, reading Binghamton to New York City. The passenger could decide when he got to Jersey City, due to sickness or any other reason, that he wanted to stop off, in which instance the driver would punch his ticket and make a notation showing he had ridden from Binghamton to Jersey City. The ticket would be returned to the passenger [fol. 40] and the driver would record these facts on his trip record. The next day the passenger might decide to go on into New York City, so he would use the same ticket

and complete his ride. Now, there is another situation under which the passenger might be issued a two tear ticket in order to simplify his ride and the accounting. If a passenger knew when he left Binghamton that he wanted to stop over in Jersey City, we would issue a ticket in two tears, one reading, "Binghamton to New York City", which the first driver would lift, and the other reading, "Jersey City to New York City," which the second driver would lift, but in each instance the bookkeeping is the same.

Q. At the end of the compilation on page four, Mr. Phillips, there appears, "(a) Receipts from interstate business on trips into New York City, $506.73", and there follows similar rece-pts designated, "* * * not into New York City", and, finally, " * * * outside New York State". What do those refer to?

A. The first caption "(a) Receipts from interstate business on trips into New York City, $506.73", all of which has been considered business within New York State, that might result from a passenger originating in Syracuse whose destination was New York City. He might have decided to lay over in Binghamton. You see the Syracuse to Binghomton portion of his ride was wholly in New York State; therefore, all the proceeds from it were shown as wholly within New York State. Now, the receipts from [fol. 41] interstate business on trips not into New York City—we decided that it was much too much detail for us to go through each trip report where there was a layover and try to match it up with the final destination of a passenger whose destination was not within the State of New York or, in this instance, not within New York City. The passenger might have held a ticket reading "Syracuse to Philadelphia." He might have decided to lay over in Binghamton, N. Y. The haul from Syracuse to Binghamton would be a haul within New York State, although he is riding on an interstate ticket whose destination is Philadelphia. Theoretically and technically no portion of that haul would be subject to the tax under 186-A. However, in order to eliminate extreme detail recordings of all tickets, we permit the drivers to group tickets reading from a certain origin to a certain destination. For instance, of this day a driver might have had 10 tickets reading "Syracuse-Binghamton". Now of those 10 tickets there might have been a stui or a tear of a Syracuse-Philadelphia ticket included. Rather than examine all of our trip reports of later

dates to determine when that passenger went on and whether or not it was a ticket whose destination was outside New York State, we just state that passenger's haul from Syracuse to Binghamton was wholly within New York State, so we set it down here as such and don't try to break it up. It was an attempt on our part to save a lot of matching. You see the passenger might have bought a two tear ticket [fol. 42] out of Syracuse to Philadelphia and used the Syracuse-Binghamton portion of it today, and he might use the Binghamton-Philadelphia portion of it sixty days from now. We just did not want to go through all the work of doing the matching.

Mr. Burton: That figure would include the gross receipts for the full amount of the ticket——

A. It would be the amount from Syracuse to Binghamton only in this case.

Mr. Kent: Why is not that reported as subject to tax under Section 186-A?

A. Because it was an interstate ticket whose destination *with* Philadelphia, in this instance.

Q. How could you determine that, Mr. Phillips, unless you did match it up with the remainder of the ticket among all the tickets received?

A. The ticket stub itself tells that, you see. If it was a two tear ticket, the original stub would say "Syracuse to Philadelphia"—origin, Syracuse, destination Philadelphia—but this ride, Syracuse to Binghamton.

Q. Then that portion of the ticket that is picked up on the trip from Syracuse to Binghamton would reveal that it was originally a Philadelphia through ticket?

A. That is right, but in order to eliminate a lot of decoding and bookkeeping, which would take more time than it was worth, we decided where tickets were grouped on a driver's report and explanation made we would let that explanation stand rather than break it up——

[fol. 43] Q. I suppose it would be unusual but conceivable that a passenger might buy a ticket at Philadelphia and then abandon his trip at Binghamton?

A. If he did, he would ask for a refund, and if he did we could make it in that instance, because we have a local franchise between Syracuse and Binghamton, and if he did that we would have to include that portion of his haul

from Syracuse to Binghamton in the subsequent tax return under 186-A, because that constitutes a wholly local ride, and it would become local after we refunded the interstate portion of it from Binghamton to Philadelphia.

Mr. Burton: Have you included in any of your returns receipts of that nature?

A. Well, I don't know. They would be so very very infrequent that none have ever come to my direct attention. I am not sure that the occasion has ever happened. I am just citing what might happen.

Mr. Burton: Is your accounting so set up that you would include it if that happened?

A. Oh, yes. The accounting would permit us to do it, but whether or not we have ever had an instance of a refund like that I don't know.

Q. Well, in general, Exhibit "A" then shows the total results for the month of July, 1937, on all tickets sold from points within New York to points within New York but with intervening travel outside the State?

A. Yes, sir.

Q. And the proportion of mileage within and without New York?

A. Yes, sir.

[fol. 44] Q. It is understood that this hearing is limited to proof with respect to the month of July, 1937, that all subsequent applications for revision will be held pending the outcome of whatever litigation results as a result of this hearing, and that the pending applications will be determined according to whatever decision is reached by the courts.

Mr. Hornbeck: That is right.

[fol. 45]

EXHIBIT 7

Central Greyhound Lines, Inc. of New York

Receipts from Interstate Business which Originates and Terminates in New York State

Month of July, 1937

City	Miles (1) To New York City	Miles (2) Within New York State	Percent of (2) to (1)	Interstate Revenue Total	Interstate Revenue Within New York State
Buffalo	386.2	172.7	44.72	$19,479.85	$8,711.39
Batavia	347.4	133.9	38.54	437.11	168.46
Mt. Morris	319.8	106.3	33.24	397.52	128.81
Dansville	304.2	90.7	29.82	228.45	68.12
Hornell	297.6	84.1	28.26	578.75	163.55
Bath	273.9	60.4	22.05	355.96	78.49
Corning	258.1	39.6	15.65	714.20	111.77
Elmira	237.0	23.5	9.92	1,581.23	156.86
Waverly	219.4	5.9	2.69	260.95	7.02
Sonyea	315.9	102.4	32.42	143.19	46.42
Campbell	262.5	49.0	18.67	57.84	10.80
[illegible]ion	335.8	122.3	36.42	9.90	3.61
Painted Post	259.8	46.3	17.82	7.30	1.30
Rochester	375.6	195.1	51.94	2,642.54	1,372.54
Pittsford	367.6	187.1	50.90	14.85	7.56
Honeoye Falls	370.6	190.1	51.30	4.95	2.54
Canandaigua	347.6	167.1	48.07	154.11	74.08
Geneva	330.6	150.1	45.40	200.00	90.80
Waterloo	323.6	143.1	44.22	15.92	7.04
Seneca Falls	319.6	139.1	43.52	47.25	20.56
Auburn	302.6	122.1	40.35	419.34	169.20
Elbridge	293.6	113.1	38.52	7.90	3.04
[fol. 46]					
Camillus	287.6	107.1	37.24	11.64	4.35
Syracuse	276.6	96.1	34.74	9,575.40	3,326.49
Tully	257.9	77.4	30.01	22.11	6.64
Homer	245.0	64.5	26.33	67.43	17.75
Cortland	242.1	61.6	25.44	1,963.52	499.52
Marathon	227.1	46.6	20.52	50.47	10.36
Lisle	220.1	39.6	17.99	42.26	7.60
Whitney Point	217.8	37.3	17.13	67.49	11.56
Castle Creek	209.4	28.9	13.80	30.65	4.23
Little York	249.5	69.0	27.66	3.65	1.01
Binghamton	190.3	18.8	9.43	3,612.01	340.61
Scranton	133.8	5.6	4.19	597.74	25.05
Port Allegany	315.7	5.6	1.77	36.75	.65
Towanda	198.7	5.6	2.82	11.85	.33
Stroudsburg	91.7	5.6	6.11	1.28	.08
Warren	380.0	5.6	1.47	34.26	.50
Sayre	217.1	5.6	2.58	3.40	.09
Daleville	122.8	5.6	4.56	30.96	1.41
Delaware Water Gap	85.6	5.6	6.54	3.66	.24
Budd Lake	51.2	5.6	10.94	73	08
Netcong	49.5	5.6	11.31	1.22	.14
Hackettstown	58.4	5.6	9.59	83	08
Jersey City	8.8	5.6	63.64	10	06
Pittston	144.1	5.6	3.89	1.94	.08
Tannersville	99.2	5.6	5.65	1.27	07
Mt. Pocono	106.3	5.6	5.27	2.80	.15
Watertown	345.9	321.5	92.95	2,017.52	1,875.28
Lowville	317.8	293.4	92.32	184.45	170.28
Booneville	294.3	269.9	91.71	53.90	49.43

[fol. 47]

EXHIBIT 7

Central Greyhound Lines, Inc. of New York

Receipts from Interstate Business which Originates and Terminates in New York State

Month of July, 1937

City	Miles (1) To *New York City	Miles (2) Within New York State	Percent of (2) to (1)	Interstate Revenue Total	Interstate Revenue Within New York State
Remsen	279.5	255.1	91.27	3.90	3.56
Utica	262.2	237.8	90.69	1,684.79	1,527.94
Ilion	250.0	225.6	90.24	104.83	94.60
Herkimer	246.7	222.3	90.11	223.05	200.99
Little Falls	239.4	215.0	89.81	157.12	141.11
Palatine Bridge	219.7	195.3	88.89	40.35	35.87
Fonda	207.7	183.3	88.25	249.82	220.47
Amsterdam	196.9	172.5	87.61	599.49	525.21
Schenectady	180.4	156.0	86.47	1,775.83	1,535.56
Troy	165.2	140.8	85.23	1,580.01	1,346.64
Albany	157.6	133.2	84.52	8,340.93	7,049.75
Coxsackie	135.3	110.9	81.97	418.40	342.96
Athens	129.9	105.5	81.22	32.34	26.27
Catskill	124.7	100.3	80.43	2,939.78	2,364.47
Cementon	118.4	94.0	79.39	40.33	32.02
Saugerties	112.9	88.5	78.39	1,125.36	882.17
Kingston	101.0	76.6	75.84	7,020.25	5,324.16
Port Ewen	98.6	74.2	75.25	161.96	121.87
Esopus	93.2	68.8	73.82	68.93	50.88
West Park	92.2	67.8	73.54	278.31	204.67
Highland	85.4	61.0	71.43	258.29	185.50
Milton	80.9	56.5	69.84	172.59	120.54
Marlboro	76.8	52.4	68.23	285.30	194.66
Middlehope	73.1	48.7	66.62	6.80	4.53
Newburg	68.5	44.1	64.38	620.91	399.74
Vails Gate	63.5	39.1	61.57	23.55	14.50
Mountainville	59.0	34.6	58.64	39.40	23.10
Highland Mills	54.5	30.1	55.23	283.13	156.37
Central Valley	53.4	29.0	54.31	70.25	38.15
Rosendale	97.4	73.0	74.95	992.22	743.67
Tillson	95.6	71.2	74.48	157.66	117.43
[fol. 48]					
New Paltz	89.5	65.1	72.74	437.01	317.88
Ireland Corners	83.7	59.3	70.85	124.42	88.15
Wallkill	77.5	53.1	68.52	131.27	89.95
Walden	74.0	49.6	67.03	311.89	209.06
Scotts Corners	71.3	46.9	65.78	44.07	28.99
Maybrook	68.0	43.6	64.12	38.64	24.78
Washingtonville	61.7	37.3	60.45	112.95	68.28
Zinderzest Park	56.1	31.7	56.51	28.00	15.82
Monroe	53.9	29.5	54.73	173.35	94.87
Harriman	50.8	26.4	51.97	30.27	15.73
Southfields	45.8	21.4	46.72	251.46	117.48
Tuxedo	42.2	17.8	42.18	86.13	36.33
Sloatsburg	39.5	15.1	38.23	91.24	34.88
Ramapo	37.2	12.8	34.41	9.65	3.32
Suffern	35.7	11.3	31.65	209.84	66.41
Sharon Springs	219.6	195.2	88.89	766.41	681.26
Richfield Springs	240.2	215.8	89.84	194.64	174.86
Copenhagen	330.7	306.3	92.62	9.80	9.08
Turin	305.5	281.1	92.01	55.15	50.74
Houseville	309.7	285.3	92.12	8.55	7.88

Frankfort	252.5	228.1	90.34	32.25	29.13
Carlisle	209.2	184.8	88.34	13.14	11.61
Springfield Center	234.1	209.7	89.58	5.10	4.57
St. Johnsville	228.8	204.4	89.34	79.68	71.19
Cherry Valley	226.5	202.1	89.23	73.05	65.18
Watervliet	166.0	142.6	85.30	19.50	16.63
Ravena	142.9	118.5	82.93	62.46	51.80
[fol. 49]					
Malden	115.2	90.8	78.82	52.03	41.01
Burnside	65.6	41.2	62.81	1.25	.79
Killowog	224.1	43.6	19.46	6.90	1.34
Savona	267.1	53.6	20.07	3.48	.70
Newark, N. J.	14.3	5.6	39.16	.22	.09
West Camp	147.0	92.6	79.15	1.80	1.42
Sloansville	203.1	178.7	87.99	13.19	11.61
Ulster Park	95.1	70.7	74.34	49.50	36.80
Barnveld	275.6	251.2	91.15	3.80	3.46
Talcottsville	298.3	273.9	91.82	8.50	7.80
Pt. Allegany to					
E. Aurora	85.0	68.5	80.59	2.52	2.03
Arcade	63.2	46.7	73.89	1.25	.92
Machias	52.3	35.8	68.45	3.05	2.09
Delevan	57.5	41.0	71.30	7.50	5.35
Franklinville	45.6	29.1	63.82	8.79	5.61
Olean	25.0	8.5	34.00	35.10	11.93
Portville	19.5	3.0	15.38	.80	.12
Buffalo	103.0	86.5	83.98	15.10	12.68
Scranton to					
Binghamton	65.5	13.2	20.15	36.04	7.26
Syracuse	142.8	90.5	63.38	198.52	125.82
Elmira	103.2	17.9	17.34	42.90	7.44
Buffalo	252.4	167.1	66.20	210.39	139.28
Bath	140.1	54.8	39.11	15.54	6.08
Batavia	213.6	128.3	60.07	6.56	3.94
Mt. Morris	186.0	100.7	54.14	18.76	10.16
Tully	124.1	71.8	57.86	1.65	.95
Rochester	241.8	189.5	78.37	32.49	25.46
Hornell	163.8	78.5	47.92	21.28	10.20
Cortland	108.3	56.0	51.71	13.23	6.84
[fol. 50]					
Auburn	168.8	116.5	69.02	6.17	4.26
Corning	119.3	34.0	28.50	22.01	6.27
Lisle	86.3	34.0	39.40	1.25	.49
Canandaigua	213.8	161.5	75.54	3.12	2.36
Waverly	85.6	.3	.35	5.05	.02
Sonyea	182.1	96.8	53.16	5.30	2.82
Buffalo to					
W. Pittston	249.0	167.1	67.11	8.56	5.74
Stroudsburg	294.5	167.1	56.74	12.51	7.10
Towanda	187.5	167.1	89.12	16.08	14.33
Hackettstown	327.8	167.1	50.98	4.92	2.51
Jersey City	377.4	167.1	44.28	5.18	2.29
Binghamton to					
Jersey City	191.0	13.2	6.91	2.57	.18
Daleville to					
Syracuse	153.8	90.5	58.84	6.84	4.02
Cortland	119.3	56.0	46.94	11.65	5.47
Homer	122.2	69.9	57.20	8.52	4.87
Newark to					
Syracuse	262.3	90.5	34.50	3.26	1.12
Elmira	222.7	17.9	8.04	2.90	.23
Rochester	361.3	189.5	52.45	12.90	6.77
Rochester to					
Paterson	358.6	189.5	52.84	3.49	1.84
Hackettstown	317.2	189.5	59.74	3.77	2.25
Mt. Pocono	269.3	189.5	70.37	7.10	5.00

[fol. 45]

EXHIBIT 7

Central Greyhound Lines, Inc. of New York
Receipts from Interstate Business which Originates and Terminates in New York State
Month of July, 1937

City	Miles (1) To *New York City	Miles (2) Within New York State	Percent of (2) to (1)	Interstate Revenue Total	Interstate Revenue Within New York State
Syracuse to Jersey City	268.3	90.5	33.73	3.58	1.21
Montclair	256.2	90.5	35.32	3.18	1.12
[fol. 51] Tobyhanna	164.9	90.5	54.88	2.46	1.35
Mt. Morris to Laceyville	142.8	100.7	70.03	1.15	.81
Tunkhannock	160.6	100.7	62.70	2.22	1.39
Cortland to Delaware Water Gap	156.5	56.0	35.78	2.03	.73
Hornell to Caldwell	273.1	78.5	28.74	3.86	1.10
Campbell to Pittston	125.8	43.4	34.50	1.99	.69
(a) Receipts from interstate business on trips into New York City				506.73	506.73
(b) Receipts from interstate business on trips not into New York City				3,252.44	3,252.44
(c) Receipts from interstate business on trips outside New York State				331.18	-0-
TOTAL				$84,412.31	$48,508.97
Percent				100.00	57.47

[fol. 52] * Miles into New York City with the exception of those indicated otherwise.

These points are shown because of layover or transfer.

(a) Receipts from interstate business on trips into New York City which, due to layover in New York State, is all credited within New York State.

(b) Receipts from interstate business on local trips in New York State which carried a portion of business originated and terminating in New York State.

(c) Receipts from interstate business which originated and terminated in New York State but recorded on trips outside New York State due to layover or transfer.

[fol. 53] EXHIBIT 8

State of New York

Department of Taxation and Finance

Corporation Tax Bureau

Albany, N. Y.,
January 27, 1943.

In the Matter of the Application of CENTRAL GREYHOUND LINES, INC., OF NEW YORK, for Revision of Additional Tax under Section 186-a of Article 9 of the Tax Law for the Month of July, 1937

Application having been made by the above named Central Greyhound Lines, Inc., of New York for revision of additional tax assessed against it by the State Tax Commission under Section 186-a of Article 9 of the tax law for the month of July, 1937, and the State Tax Commission having heard the proofs offered on behalf of the said Central Greyhound Lines, Inc., of New York, in support of said application, does hereby determine after due consideration thereof that the additional tax heretofore assessed against the said Central Greyhound Lines, Inc., of New York, for the month of July, 1937, in the amount of One Thousand Six Hundred [fol. 54] Eighty-eight and 24/100 Dollars ($1,688.24) should be affirmed, which said amount of One Thousand Six Hundred Eighty-eight and 24/100 Dollars ($1,688.24) is hereby determined as the amount of additional tax which said Central Greyhound Lines, Inc., of New York, is liable to pay under the provisions of Section 186-a of Article 9 of the tax law for the month of July, 1937.

E. W. Burton, Deputy Director.

Countersigned: Carroll E. Mealey, Joseph M. Mesnig, Tax Commissioners.

In Supreme Court of New York, Albany County

[Title omitted]

Stipulation

It Is Stipulated That, in making its final determination [fol. 55] herein, the State Tax Commission found as a fact that, in the month of July, 1937, the petitioner received from bus transportation originating and terminating in this State but traversing without this State for some portion of the journey the sum of $84,412.31, which amount was not included in the petitioner's return of gross taxable income for that month or taxed by the Tax Commission's original assessment, and found, as a fact, that 57.47% of the total mileage of such journeys was traversed within this State and 42.53% of such total mileage was traversed without this State.

It Is Further Stipulated That, in making its final determination, the State Tax Commission found, as conclusions of law, that section 186-a of the Tax Law applies to such bus transportation originating and terminating in this State; that that section, so construed, violates neither the Federal or State Constitutions, and that the receipts from such transportation should not be prorated according to the mileage traversed in and out of this State.

Dated March 6, 1934.

Bond, Schoeneck & King, Attorneys for Petitioner.
Nathaniel L. Goldstein, Attorney-General, Attorney for Respondents.

[fol. 56] Stipulation Waiving Certification

It Is Stipulated that the foregoing are true and correct copies of the Order of Transference, Notice of Motion, Petition, Affidavit in support of Motion, Answer and Return of the Respondents and the exhibits annexed thereto, and Stipulation of the Parties, and the whole thereof, now on file in the office of the Clerk of the County of Albany; and certification thereof by said clerk, pursuant to section 616 of the Civil Practice Act, is hereby waived.

Dated July —, 1943.

Bond, Schoeneck & King, Attorneys for Petitioner.
Nathaniel L. Goldstein, Attorney-General, Attorney for Respondents.

[fol. 57] IN COURT OF APPEALS OF NEW YORK

CENTRAL GREYHOUND LINES, INC., OF NEW YORK, Petitioner-Appellant,

vs.

CARROLL E. MEALEY, JOHN P. HENNESSEY, and JOSEPH M. MESNIG, constituting the State Tax Commission of the State of New York, Respondents.

NOTICE OF APPEAL TO COURT OF APPEALS

Please take notice that pursuant to leave granted by the Court of Appeals in the above entitled proceeding by an order duly made and filed in the Office of the Clerk of that Court on the 2nd day of March, 1944, the above named appellant hereby appeals to the Court of Appeals from the order of the Appellate Division, Third Department, entered in the office of the Clerk of said Appellate Division on the 13th day of November, 1943, which order affirmed a decision of the State Tax Commission dated January 27, 1943, and this appeal is from each and every part of said order.

[fol. 58]

Dated: March 27, 1944.

Yours, etc., Bond, Schoeneck & King, Attorneys for Petitioner-Appellant, Office and P. O. Address, 1400 State Tower Building, Syracuse, New York.

To: County Clerk of Albany County, Court House, Albany, New York. John S. Herrick, Clerk of the Appellate Division, Court House, Albany, New York. Nathaniel L. Goldstein, Attorney-General, Attorney for Respondent, The Capitol, Albany, New York.

[fol. 59] IN COURT OF APPEALS OF NEW YORK

CENTRAL GREYHOUND LINES, INC., OF NEW YORK, Petitioner-Appellant,

vs.

CARROLL E. MEALEY, JOHN P. HENNESSEY, and JOSEPH M. MESNIG, constituting the State Tax Commission of the State of New York, Respondents.

ORDER GRANTING LEAVE TO APPEAL TO COURT OF APPEALS —March 2, 1944

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the petitioner-appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is granted.

A Copy.

Raymond J. Cannon, Deputy Clerk. (Seal.)

[fol. 60] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

Present: Hon. James P. Hill, Presiding Justice, Hon. John C. Crapser, Hon. F. Walter Bliss, Hon. Christopher J. Heffernan, Hon. Gilbert V. Schenck, Associate Justices.

CENTRAL GREYHOUND LINES, INC., OF NEW YORK, Petitioner,

vs.

CARROLL E. MEALEY, JOHN P. HENNESSEY, and JOSEPH M. MESNIG, constituting the State Tax Commission of the State of New York, Respondents.

ORDER OF AFFIRMANCE—Entered November 13, 1943

The petitioner above named having heretofore and on or about the 17th day of February, 1943, served and filed a written petition under the provisions of Article 78 of the Civil Practice Act, wherein and whereby it sought to review [fol. 61] a final determination of the State Tax Commission made on or about the 27th day of January, 1943, confirming

the assessment of an additional tax under Section 186-a of the Tax Law for the month of July, 1937, against the petitioner; and the respondents having on or about the 23rd day of February, 1943, duly served and filed their answer and return; and an order having been duly entered on or about the 26th day of February, 1943, transferring the proceeding to this Court for disposition; and the issues raised having come on for hearing before this Court at the above named term thereof; and the cause having been argued and petitioner having appeared by Bond, Schoeneck & King, Esqs., (Lyle W. Hornbeck, Esq., of counsel), its attorney, and the respondents having appeared by Nathaniel L. Goldstein, Attorney-General of the State of New York (John C. Crary, Jr., Assistant Attorney-General, of counsel), their attorney; and due deliberation having been had thereon,

Now, on motion of Nathaniel L. Goldstein, Attorney-General of the State of New York, attorney for respondents, it is

Ordered, That the said final determination of the State Tax Commission made on the 27th day of January, 1943, be, and the same hereby is, unanimously confirmed, with Fifty Dollars costs and disbursements.

John S. Herrick, Clerk.

[fol. 62] A true copy, John S. Herrick, Clerk, Ent. 11/13/43.

In Supreme Court of New York, Appellate Division, Third Judicial Department

Central Greyhound Lines, Inc., of New York, Petitioner,

vs.

Carroll E. Mealey, and Others, constituting the State Tax Commission of the State of New York, Respondents

Decision—November 10, 1943

Determination in all respects confirmed with $50., costs and disbursements.

Opinion by Bliss, J.

All concur.

[fol. 63] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

CENTRAL GREYHOUND LINES, INC., OF NEW YORK, Petitioner,

vs.

CARROLL E. MEALEY, JOHN P. HENNESSEY, and JOSEPH M. MESNIG, constituting the State Tax Commission of the State of New York, Respondents.

Argued: September, 1943 Term. Decided: — 1943.

Hon. James P. Hill, P. J., Hon. J. C. Crapser, Hon. F. W. Bliss, Hon. C. J. Heffernan, Hon. G. V. Schenck, A.JJ.

Review in the nature of certiorari under Article 78 of the Civil Practice Act and related provisions of the Tax Law of a final determination of the State Tax Commission dated January 27, 1943 which denied revision of an assessment of additional taxes against the petitioner in the amount of $1688.24 under section 186-a of the Tax Law.

[fol. 64] Messrs. Bond, Schoeneck & King, Attorneys for Petitioner, 1400 State Tower Bldg., Syracuse, N. Y.

Nathaniel L. Goldstein, Esq., Attorney-General of the State of New York, Attorney for Respondents, The Capitol, Albany, N. Y.

OPINION FOR CONFIRMATION

BLISS, J.:

The facts are undisputed. Petitioner, a New York Corporation is a utility engaged in the business of a common carrier by omnibus subject to the supervision of the New York State Department of Public Service. A portion of its business consists of transporting passengers from points in New York State to destinations in New York State over routes which lie in part in an adjoining state or states.

Section 186-a of the Tax Law imposes an emergency tax equal to two percent of its gross income upon every utility doing business in this state which is subject to the supervision of the State Department of Public Service, having an annual gross income in excess of $500.00. The words "gross income" are defined by this statute to "mean and include receipts received in or by reason of any sale • • • made or service rendered for ultimate consumption or use by the purchaser in this state. • • • ".

[fol. 65] The petitioning utility contends first that its business of transporting passengers between termini, both of which are in New York State over routes which lie in part in an adjoining state or states, is not the rendering of service for ultimate consumption or use by the purchaser in this state. It argues further that if receipts for the sale of utility services for use partly within and partly without the state are taxable under section 186-a when the journey originates and terminates in New York State, then the tax must be limited to the revenue attributable to the mileage in New York State, otherwise the statute is unconstitutional and a violation of the interstate commerce provision of the Federal Constitution.

It is to be noted first that the emergency tax imposed by section 186-a is laid upon the utility for the privilege of doing business within New York State. It is measured by the gross income of the utility received in or by reason of any sale made or service rendered for ultimate consumption or use by the purchaser in this state. The tickets entitling the passengers for the journies here in dispute are apparently all sold and payment therefore received within New York State. The journeys contracted for begin and end in this state. Similar journeys of freight or passengers have been held not to be interstate commerce. (Lehigh Valley Railway vs. Commonwealth of Pennsylvania, 145 U. S. 192; People ex rel. Cornell Steamboat Co. v. Sohmer, 235 U. S. 549). It is a mere incident of a continuous journey between two points within New York State if a portion of the journey happens to lie within an adjoin- [fol. 66] ing state. What the passenger desires and the utility contracts to furnish is transportation from one point in New York State to another point in this state. His principal object is transportation between the termini. It is a matter of geography if physical or other reasons impel the utility to follow a route partly through another state. It is a service rendered to the purchaser in this state. If the journey were made in two or more distant parts with definite interruptions in another state so that it composed two or more journeys instead of one, the situation would be quite different. The income received from the services here in question comes within the statutory definition of gross income.

In the light of the federal decisions we see no merit to the contention of petitioner that section 186-a of the Tax

Law as above construed is a violation of the interstate commerce clause of the Federal Constitution. As stated above, this kind of transportation is not interstate commerce. (People ex rel. Cornell Steamboat Company vs. Sohmer, 235 U. S. 549; Lehigh Valley Railway Co. vs. Pennsylvania, 145 U. S. 192).

Finally, this is a tax against a certain corporation for the privilege of doing business in New York State. It is measured by their gross income. Consequently it is not a burden upon the particular business here sought to be exempted.

The determination should be in all respects confirmed with $50.00 costs and disbursements.

[fol. 67] STIPULATION WAIVING CERTIFICATION TO THE COURT OF APPEALS

Pursuant to Section 170 of the Civil Practice Act it is hereby stipulated that the foregoing consists of true and correct copies of the papers on appeal to the Appellate Division, Third Department, the Notice of Appeal to the Court of Appeals pursuant to leave, the Order of the Appellate Division appealed from, the Decision of the Appellate Division, Third Department and the Opinion of the Appellate Division, Third Department, all of which are now on file in the Office of the Clerk of the Appellate Division, Third Department, and that certification thereof is hereby waived.

Dated: March 27th, 1946.

Bond, Schoeneck & King, Esqs., Attorneys for Petitioner-Appellant. Nathaniel L. Goldstein, Attorney-General, Attorney for Respondent. By John C. Crary, Jr., Assistant Attorney General.

[fol. 68] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

[Title omitted]

ORDER DENYING MOTION FOR LEAVE TO APPEAL TO COURT OF APPEALS—January 14, 1944

The above named petitioner, Central Greyhound Lines, Inc., of New York, having moved this Court for an order granting leave to the petitioner to appeal to the Court of Appeals from the order of this Court in the above entitled proceeding, entered herein on the 13th day of November, 1943 and the said motion having been submitted upon the papers, and due deliberation having been had thereon,

Now, on motion of Nathaniel L. Goldstein, Attorney-General of the State of New York, attorney for the respondents, it is

[fol. 69] Ordered, that the said motion for leave to appeal to the Court of Appeals be, and the same hereby is, denied, without costs.

John S. Herrick, Clerk.

A true copy. John S. Herrick, Clerk. (Seal.)

Entered 1/14/44.

[fol. 69a] SIR:

Take notice that the within is a copy of Order duly filed and entered in the office of the Clerk of Albany County on the — day of January, 1944.

Yours, etc., Nathaniel L. Goldstein, Attorney-General. —— ——, Attorney for Respondents, Office and Post Office Address, Capitol, Albany, N. Y.

To Bond, Schoeneck & King, Attorney for Petitioner, 1400 State Tower Bldg., Syracuse, N. Y.

[fol. 70] IN COURT OF APPEALS OF NEW YORK

CENTRAL GREYHOUND LINES, INC., OF NEW YORK, Petitioner-Appellant,

vs.

CARROLL E. MEALEY, JOHN P. HENNESSEY, and JOSEPH M. MESNIG, Constituting the State Tax Commission of the State of New York, Respondent.

NOTICE OF APPEAL

Please Take Notice That pursuant to leave granted by the Court of Appeals in the above entitled proceeding by an order duly made and filed in the Office of the Clerk of that Court on the 2nd day of March, 1944, the above named appellant hereby appeals to the Court of Appeals from the order of the Appellate Division, Third Department, entered in the office of the Clerk of said Appellate Division on the 13th day of November, 1943, which order affirmed a decision of the State Tax Commission dated January 27, 1943, and this appeal is from each and every part of said order.

Dated March 27, 1944.

Yours, etc., Bond, Schoeneck & King, Attorneys for Petitioner-Appellant. Office and P. O. Address, 1400 State Tower Building, Syracuse, New York.

To County Clerk of Albany County, Court House, Albany, New York.

John S. Herrick, Clerk of the Appellate Division, Court House, Albany New York.

Nathaniel L. Goldstein, Attorney General, Attorney for Respondent, The Capitol, Albany, New York.

[fol. 71] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 23rd day of July, in the year of our Lord one thousand nine hundred and forty-six, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—July 23, 1946

[fol. 72] CENTRAL GREYHOUND LINES, INC., OF NEW YORK, Appellant,

ag'st.

CARROLL E. MEALEY & ORS., &c., State Tax Commission of the State of New York, Respondent

Be It Remembered, That on the 10th day of April, in the year of our Lord one thousand nine hundred and forty-six, Central Greyhound Lines, Inc., of New York, the appellant in this cause, came here unto the Court of Appeals, by Bond, Schoeneck & King, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Carroll E. Mealey & ors., constituting the State Tax Commission of the State of New York, the respondents in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 73] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Charles A. Schoeneck, of counsel for the appellant, and by Mr. John C. Crary, Jr., of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

[fol. 74] Therefore, it is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE

Albany, July 23, 1946.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 74a] IN COURT OF APPEALS OF NEW YORK

Central Greyhound Lines, Inc., of New York, Appellant, v. Carroll E. Mealey, et al., Constituting the State Tax Commission, Respondents

Decided July 23, 1946

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 13, 1943, in a proceeding under Article 78 of the Civil Practice Act (transferred to the Appellate Division by an order of the Supreme Court at Special Term, entered in Albany County) which unanimously confirmed a determination of the State Tax Commission affirming an assessment of an additional tax (entitled "Emergency Tax on the Furnishing of Utility Services").

Charles A. Schoeneck for appellant. Nathaniel L. Goldstein, Attorney-General (John C. Crary, Jr., and Wendell P. Brown of counsel), for respondents.

OPINION

CONWAY, J.

There is presented for construction a part of section 186-a of the Tax Law. That section imposes an emergency tax of 2% upon the gross income of every utility doing business in this state which is subject to the supervision of the State Department of Public Service and which has an annual gross income in excess of $500. The petitioner is a corporation engaged in business as a common carrier by omnibus and subject to the supervision of the Public Service Commission. It operates omnibusses both within and without the state. Subdivision 2, section (a) provides that the word "utility" includes every person subject to the supervision of the state department of public service with certain exceptions not material here. Subdivision 2, section (b) provides that the word "person" includes corporations.

Subdivision 2, section (c) provides: "The words 'gross income' mean and include receipts received in or by reason of any sale * * * made or servive rendered for ultimate consumption or use by the purchaser in this state * * * ".

The State Tax Commission included within petitioner's gross income, for the purpose of computing the emergency tax, receipts from sales of tickets for certain journeys which originated and terminated in New York State but which went through New Jersey and Pennsylvania. At the hearing before the Commission, the proof was limited to figure for July, 1937, with the stipulation that the result should be applicable to all the asses-ments for which application for revision had been filed.

The regular route of the busses of this company traveling between New York City and cities and villages in upstate New York is through New Jersey and Pennsylvania. A passenger who wishes to go to New York City from Buf- [fol. 74b] falo, for instance, buys a single ticket marked "Buffalo to New York City". The bus travels within this State from Buffalo to Elmira; en route from Elmira to Towanda, Pennsylvania, it crosses the Pennsylvania State line and continues through Pennsylvania to Scranton. En-route from Scranton, it crosses the New Jersey State line and continues through New Jersey to the Holland or Manhattan Tunnel and into New York City.

Petitioner's Exchange 7 (pp. 45-51 of the record), entitled "Receipts from Interstate Business Which Originates and

Terminates in New York State", breaks down the total receipts of July, 1937, for journeys originating and terminating in New York State into two figures: $84,412.31 which represents receipts for total mileage covered on these trips, and $48,508.97 which represents receipts for mileage covered within New York State on these trips. Receipts for journeys which begin at a point in New York State and terminate at a point outside of the State, or the reverse, are not included in this controversy.

The contention of the petitioner at the hearing before the Commission was that gross income to be taxed under this statute, if any, is limited to receipts representing mileage covered within New York State. The assessment of $1,688.24 made by the Commission on the basis of total receipts for these journeys was affirmed upon the hearing. It was stipulated that the Commision found that (1) 42.53% of the total mileage of such journeys was traversed without the State, and 57.47% within the state; (2) that § 186-a of the Tax Law applies to bus transportation originating and terminating in this State; (3) that § 186-a so construed violates neither the Federal nor State Constitutions; and (4) that the receipts from such transportation should not be prorated according to the mileage traversed in and out of this State.

Petitioner advances two arguments. The first is that the language of section 186-a includes within "gross income" receipts for sales made or service rendered for ultimate consumption or use by the purchaser in this State, but does not include sales made or service rendered for consumption or use partly within and partly without the State. Petitioner argues that the word "ultimate" has no reference to the point of destination in transportation and may therefore be disregarded. It explains that that word was used in order to make the tax applicable to the resale of utility services by the original purchaser of such service (for instance, submeters), and at the same time to avoid pyramiding of taxes which would result from taxation of both wholesale and retail sales. There seems no reason to doubt this explanation of the word "ultimate" so far as it refers to submeterers. Indeed, the "Declaration of legi-*al*tive intent" which accompanied the amendment of section 186a in 1941 (L. 1941, c. 137, §1) states: "It was intended to include persons and corporations which were directly in competition with ordinary utilities, such as, landlords and submeterers

who buy their services from other utilities and, in turn, resell such services. For that reason the tax was imposed on receipts from sales to ultimate consumers. Receipts from the sale of such utility services to submeterers were not taxed, but receipts of submeterers from their own customers were intended to be taxed."

[fol. 74c] However, that aspect of the use of the word "ultimate" does not render it necessary to ignore the word entirely in relation to transportation. Nor do I think the Legislature intended such a result. Subdivision 1 of the section distinguishes between utilities subject to the supervision of the department of public service and utilities not so subject. Submeterers and landlords are not subject to the supervision of the department of public service, but they are taxable under this statute. (Matter of Lacidem Realty Corp. v. Graves, 288, N. Y. 354.) A 2% tax of its "gross income" is imposed on every utility subject to the supervision of the department of public service; a 2% tax is also imposed on the "gross operating income" of "every other utility doing business in this state". Subdivision 2, section (c) defines "gross income" (which, as used in subd. 1, refers only to income of utilities under the supervision of the department, to which class petitioner belongs) as including receipts for "any sale * * * made or service rendered for ultimate consumption or use in this state". Subdivision 2, section (d) defines "gross operating income" (which, as used in subd. 1, refers to income of those not under the supervision of the department, to which class submeterers and landlords belong) as including receipts for any "sale * * * made for ultimate consumption or use" or for "furnishing for such consumption or use * * * in this state." Thus it appears that the word "ultimate" is used in both cases.

Petitioner also points out that "§ 186-a is not the first law of this State imposing a tax upon the gross income of utilities engaged in the transportation business. It cites Section 184 of the Tax Law which imposes a franchise tax on transportation and transmission corporations and associations. That statute includes within "gross earnings" "earnings from transportation or transmission business originating and terminating within this state" but excludes "earnings derived from business of an interstate character." Petitioner argues that since section 186-a does not use the phrase "earnings derived from business originating

and terminating within this state", section 186-a excepts this type of business from taxation.

We do not think it necessary to attempt to interpret section 186-a in the light of the language of section 184. It is not shown that the two sections are related in any way. Section 184 has been in force with frequent amendments since 1880. It imposes a franchise tax on corporations doing a particular kind of business: transportation or transmission. Section 186-a, in force since 1937, imposes an emergency tax on a great number of different utility services. We think that the language of the latter is broad enough to include the kind of business in issue here, and that it was not necessary in a statute which was made applicable to such a wide field to use the specific words used in section 184 in relation to transportation corporations.

Even aside from the use of the word "ultimate", we do not agree with petitioner's assertion that the service it renders in this transportation is consumed or used partly within and partly without the State. The Appellate Division pointed that out clearly.

[fol. 74d] The second argument of petitioner is that, if the statute is construed to tax this kind of business, it should be construed to tax only that proportion of receipts attributable to mileage within this State. Its petition in the Supreme Court alleged that a construction of section 186-a which includes within gross income the total receipts for these trips is "contrary to statute and unconstitutional", but petitioner does not urge here that such construction is unconstitutional. It states that the question is not one of constitutional taxing power but of statutory construction. It relies upon Lehigh Valley Ry. v. Pennsylvania (145 U. S. 192); United States Express Co. v. Minnesota, 223 U. S. 335; and Hanley v. Kansas City So. Ry. Co. (187 U. S. 617) as indicating that the statute ought to be limited to receipts for mileage covered within this State. It should be noted here that the petitioner cites on- case where the United States Supreme Court has held that a tax on transportation originating and terminating in one State, but passing through another State must be limited to receipts for mileage covered within the State of origin and terminus. In the Lehigh Valley case, the State court had upheld a tax imposed on a railroad corporation, based on receipts for continuous transportation beginning and ending in in Pennsylvania but passing through New Jersey. It appears that

only that portion of transportation which was within Pennsylvania was taxed. The railroad objected to the tax on the ground that the transportation was interstate commerce. The question before the Supreme Court was "• • • simply whether, in the carriage of freight and passengers between two points in one State, the mere passage over the soil of another State renders that business foreign which is domestic. We do not think such a view can be reasonable entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk."

In State of Minnesota v. United States Express Co. (114 Minn. 346, 131 N. W. 489), a tax construed as a property tax was levied against the total transportation business done by defendant within the State. The Supreme Court of Minnesota held following the Lehigh case, that transportation originating and terminating in Minnesota but passing through another State was not interstate commerce. It then limited the tax, however, to the mileage within the State, saying: "This seems to us the safer rule and avoids any question of taxing interstate commerce • • •." When the case reached the United States Supreme Court it was affirmed (223 U. S. 335). It is not accurate to say that the Minnesota Court held that the Lehigh case required that the tax be limited to revenue from mileage within the State, and that the Supreme Court affirmed that holding. As in the Lehigh case, the appellant in the Supreme Court objected to the taxation of any of the transportation which originated and terminated in Minnesota but passed through another State, on the ground that that kind of business was interstate commerce. The Supreme Court cited the Lehigh case as controlling on this issue not on the question of whether the tax should be prorated. It does not appear that the latter question was before the court.

Hanley v. Kansas City So. Ry. Co. (187 U. S. 617) cited by petitioner, is not applicable here, since it determined only that commerce extending from one State to another may not be regulated by either State; it specifically distinguished the Lehigh case as an example of State taxing power.

There is no constitutional objection to taxation of the total receipts here. This is not interstate commerce (Lehigh Valley case, supra; People ex rel. Cornell Steamboat [fol. 74e] Co. v. Sohmer, 235 U. S. 549; Ewing v. Leaven-

worth, 226 U. S. 464); and, since we think that this service is "service rendered for ultimate consumption or use by the purchaser in this state", we see no reason why the statute should be construed to limit the tax to receipts attributable to mileage covered within this State in the course of continuous transportation between points in this State.

The order should be affirmed with costs.

Loughran, Ch. J., Lewis, Desmond, Thacher and Fuld, JJ., concur; Dye, J., taking no part.

Order affirmed.

[fol. 75] In Court of Appeals of New York

Present, Hon. John T. Loughran, Chief Judge, presiding.

Central Greyhound Lines, Inc., of New York, Appellant,

vs.

Carroll E. Mealey and others, constituting the State Tax Commission of the State of New York, Respondents

Order Amending Remittitur, etc.—October 15, 1946

A Motion for a re-argument of and to amend the remittitur in the above cause, having been heretofore made upon the part of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion for reargument be and the same hereby is denied. Remittitur amended by adding thereto the following: "A question under the Federal Constitution was presented and passed upon by this Court, viz. whether Section 186-a of the Tax Law of the State of New York, as construed by the Tax Commission, is repugnant to the interstate commerce provision of the Federal Constitution, Article I, Section 8. This court held that the aforesaid statute as so construed is not repugnant to that provision of the Federal Constitution."

A Copy.

Raymond J. Cannon, Deputy Clerk. (Seal.)

[fol. 76] In Supreme Court of New York, Albany County

Present: Hon. Isadore Bookstein, Justice Presiding.

Central Greyhound Lines, Inc., of New York, Petitioner,

against

Carroll E. Mealey, John P. Hennessey, and Joseph M. Mesnig, constituting the State Tax Commission of the State of New York, Respondents

Order on Remittitur—August 2, 1946

The petitioner above named having appealed to the Court of Appeals from a final order of the Appellate Division of the Supreme Court, Third Judicial Department, in the above entitled proceeding, which said order confirmed a final determination of the respondents constituting the State Tax Commission of the State of New York made on or about the 27th day of January, 1943, assessing an additional tax under Section 186-a of the Tax Law for the month of July, 1937, against the petitioner, and which said final order was duly entered in the office of the Clerk of the Appellate Division, Third Department, on the 13th day of November, 1943, and the appeal having been duly argued at the Court of Appeals, and after due deliberation had thereon, the Court of Appeals having made its decision, and having ordered and adjudged that the order of the Appellate Division of the Supreme Court so appealed from be affirmed, with costs, and having further ordered that the proceedings and record herein be remitted to the Supreme Court, there to be proceeded upon according to law,

[fol. 77] Now, on reading and filing the remittitur from the Court of Appeals herein, and upon motion of Nathaniel L. Goldstein, Attorney-General of the State of New York, attorney for the above named respondents, it is

Ordered, that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court.

Isadore Bookstein, Justice of the Supreme Court.

[fol. 78] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed October 21, 1946

To the Chief Judge of the Court of Appeals of the State of New York:

Your Petitioner, Central Greyhound Lines, Inc. of New York, respectfully shows:

1. That your Petitioner is the appellant in the above-entitled cause.

2. That (a) on June 21, 1940, the Department of Taxation & Finance notified your Petitioner that it was liable for additional taxes in the sum of $36,618.00, pursuant to Section 186-a of the Tax Law (Article 9—Corporation Tax); that by a petition verified July 6, 1940, your Petitioner applied to the Department of Taxation & Finance, State of New York, for a hearing before said Tax Commission, pursuant to the provisions of Section 186-a-6 of the Tax Law, for relief (fols. 73-80 of printed record on appeal in the Court of Appeals); that the petition, verified July 6, 1940, set forth that the additional taxes were assessed upon gross income of the Petitioner from sales of transportation services in interstate commerce originating and terminating within the State of New York but consumed and used partly within the States of New Jersey and Pennsylvania, and said petition further alleged that any assess-
[fol. 79] ment upon such income was not authorized by statute and was illegal and void, and that said assessment included taxes which could not be lawfully demanded or collected; that the said petition further alleged that the assessment was illegal and void in that if any portion of the said income was subject to taxation under Section 186-a of the Tax Law, the income from services consumed and used within the States of New Jersey and Pennsylvania must be eliminated therefrom, and that the income from such services consumed and used without the State of New York constituted over fifty per cent of such income.

(b) That a formal hearing was held at the office of the Department of Taxation & Finance, Corporation Tax Bureau, Albany, New York, on the 20th day of October, 1942

(pp. 28-52 of printed record on appeal in the Court of Appeals); that on January 27, 1943, the Department of Taxation & Finance, Corporation Tax Bureau, issued its final determination that the additional tax theretofore assessed in this matter should be affirmed, and that your Petitioner was liable under the provisions of Section 186-a of Article 9 of the Tax Law for the sums so determined to be due (fols. 157-160 of the printed record on appeal in the Court of Appeals).

(c) That by a petition dated and verified February 16, 1943 your Petitioner instituted a proceeding against the above-named respondents setting forth that additional taxes were assessed upon gross income of the Petitioner from sales of transportation services in interstate commerce originating and terminating within the State of New York but consumed and used partly within the States of New Jersey and Pennsylvania; that the said petition further alleged that the respondents, after a hearing, refused to cancel or reduce said assessment, and the petition further [fol. 80] alleged that the "determination of the Commission made January 27, 1943 is contrary to statute, is unconstitutional, and is illegal and erroneous in that any assessment upon income of the petitioner from the sales of transportation services in interstate commerce originating and terminating within the State of New York but consumed and used partly within the States of New Jersey and Pennsylvania is illegal and void and is not authorized by statute, and said assessment is further illegal and void in that if any portion of said income is subject to tax under Section 186-a of the Tax Law the income from services consumed and used within New Jersey and Pennsylvania must be eliminated therefrom and that the income from such services consumed and used without the State of New York constitutes 42.53% of such income for the month of July, 1937" (fols. 20-21 of the printed record on appeal in the Court of Appeals).

(d) That the above-named respondents filed their answer and return, verified February 23, 1943, denying that the transportation mentioned in the petition constituted interstate commerce, and denying that the services therein mentioned were partly consumed or used in the States of New Jersey or Pennsylvania, and alleged further that the tax described in the petition and affirmed by the Commis-

sion's final determination was lawfully assessed against Petitioner pursuant to the provisions of Section 186-a of the Tax Law; that on February 26, 1943, by an order of a Justice of the Supreme Court, the proceeding instituted by your Petitioner before the Supreme Court, held in and for the County of Albany, was transferred for disposition to a term of the Appellate Division of the Supreme Court in the Third Judicial Department, in accordance with the provisions of Section 1296 of the Civil Practice Act, to the [fol. 81] end that the determination of the State Tax Commission might be reviewed upon the law and upon the facts (fol. 8 of the printed record on appeal in the Court of Appeals); that on March 6, 1943, it was stipulated between the parties above named that the State Tax Commission, in making its final determination, had found as Conclusions of Law (1) that Section 186-a of the Tax Law applied to such bus transportation originating and terminating in this State, and (2) that the section, so construed, "violates neither the Federal or State Constitutions, and (3) that the receipts from such transportation should not be pro-rated according to the mileage traversed in and out of this State" (fol. 164 of the printed record on appeal in the Court of Appeals).

(e) That on September 13, 1943, the Appellate Division, Third Department, unanimously affirmed the determination of the State Tax Commission by an order of that date, and the said Appellate Division handed down an Opinion for Confirmation (fols. 187-198 of the printed record on appeal in the Court of Appeals); that the said Appellate Division set forth in their opinion as follows:

> "In the light of the federal decisions we see no merit to the contention of petitioner that section 186-a of the Tax Law as above construed is a violation of the interstate commerce clause of the Federal Constitution. As stated above, this kind of transportation is not interstate commerce. (People ex rel. Cornell Steamboat Company vs. Sohmer, 235 U. S. 549; Lehigh Valley Railway Co. vs. Pennsylvania, 145 U. S. 192). Finally, this is a tax against a certain corporation for the privilege of doing business in New York State. It is measured by their gross income. Consequently it is not a burden upon the particular business here sought to be exempted" (fols. 197-198 of the printed

record on appeal in the Court of Appeals; official report—266 A. D. 648).

[fol. 82] (f) That the Appellate Division, Third Department, denied leave to appeal to the Court of Appeals by an order entered in the office of the Clerk of the Appellate Division on January 14, 1944, and thereafter, on March 2, 1944, the Court of Appeals issued an order granting leave to appeal to the Court of Appeals (fols. 175-177 of the printed record on appeal in the Court of Appeals).

(g) That thereafter, and on June 6, 1946, this said cause was argued before the Court of Appeals, and the opinion of the said Court was rendered on July 23, 1946. The Court of Appeals stated in its opinion:

> "There is no constitutional objection to taxation of the total receipts here. This is not interstate commerce (Lehigh Valley case, supra; People ex rel. Cornell Steamboat Company vs. Sohmer, 235 U. S. 549; Ewing vs. Leavenworth, 226 U. S. 464), and since we think that this service is a service rendered for ultimate consumption or use by the purchaser in this State, we see no reason why the statute should be construed to limit the tax to receipts attributable to mileage covered within this State in the course of continuous transportation between points in this State";

that on October 15, 1946, by an order of said Court, its remittitur was amended by adding the following:

> "A question under the Federal Constitution was presented and passed upon by this Court, viz. whether Section 186-a of the Tax Law of the State of New York, as construed by the Tax Commission, is repugnant to the interstate commerce provision of the Federal Constitution, Article I, Section 8. This court held that the aforesaid statute as so construed is not repugnant to that provision of the Federal Constitution."

3. That as appears from the foregoing recital of the course of the proceedings, the record on appeal in the Court of Appeals, and examination of the entire record of the case from its inception before the Department of [fol. 83] Taxation & Finance to and through the Court of Appeals, there was drawn in question the validity of a

statute of New York State (Section 186-a of the Tax Law) on the ground of its being repugnant to the Constitution of the United States, and particularly Article I, Section 8 thereof, and it appears that the decision of the Department of Taxation & Finance, the Appellate Division of the Supreme Court, and the Court of Appeals was in favor of the validity of said statute, Section 186-a of the Tax Law.

4. That the Court of Appeals for the State of New York is the highest Court of said State in which a decision in this matter can be had.

5. That in the said cause there is drawn in question the validity of a statute and the determination of the State Tax Commission of the State of New York, on the ground that the said statute is repugnant to the Constitution and laws of the United States, and that the said determination of the State Tax Commission of the State of New York is repugnant to the Constitution and laws of the United States, and the decision is in favor of the validity of the said statute and the determination of the State Tax Commission of the State of New York, notwithstanding your Petitioner's contention that said statute violates the Constitution of the United States, Article I, Section 8 thereof, and that the determination of the State Tax Commission of the State of New York was unconstitutional in that it violated the said provision of the Constitution of the United States.

6. That therefore, in accordance with Section 237(a) of the Judicial Code (U. S. C. A., Title 28, Sec. 344), and in accordance with the Rules of the Supreme Court of the United States, your Petitioner respectfully shows this Court that the case is one in which, under the legislation [fol. 84] in force when the Act of January 31, 1928 was passed, to wit, under Section 237(a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a Writ of Error, as a matter of right.

7. That the errors upon which your Petitioner claims to be entitled to an appeal are more fully set forth in the Assignment of Errors, filed herewith, and accompanying this petition, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your Petitioner prays for an allowance of an appeal from the Court of Appeals for the State of New

York, the highest Court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the Court of Appeals for the State of New York may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Court of Appeals for the State of New York under his hand and seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and your Petitioner further prays that the proper order relating to the required security to be required of it be made.

Dated October 21, 1946.

Bond, Schoeneck & King, Attorneys for Petitioner. Office and P. O. Address 1400 State Tower Building, Syracuse, New York.

[fol. 85] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR—Filed October 21, 1946

The Petitioner-Appellant assigns the following errors in the record and proceedings in this cause:

1. The Court of Appeals for the State of New York erred in refusing to reverse, and in affirming the confirmation, final order and determination of the Appellate Division Supreme Court, and the Department of Taxation and Finance, State of New York.

2. The Court of Appeals of the State of New York erred in refusing to reverse and in affirming the determination of the Department of Taxation and Finance, State of New York, and the order of the Appellate Division Supreme Court on the grounds that there is no Constitutional objection to the taxation of the total receipts involved in the cause.

3. The Court of Appeals for the State of New York erred in the refusal to reverse and in affirming the determination of the Department of Taxation and Finance, State of New York, and the order of the Appellate Division Supreme

Court on the grounds that Section 186-a of the tax law of the State of New York was valid, and was valid as applied to the Petitioner.

[fol. 86] 4. The Court of Appeals of the State of New York erred in refusing to reverse and in affirming the determination of the Department of Taxation and Finance, State of New York, and the order of the Appellate Division Supreme Court on the grounds that the tax laid against the Petitioner was valid.

5. The Court of Appeals of the State of New York erred in refusing to reverse and in affirming the determination of the Department of Taxation and Finance, State of New York, and the order of the Appellate Division Supreme Court on the grounds that the transportation involved, in this cause, is not consumed or used partly within or partly without the State of New York.

6. The Court of Appeals of the State of New York erred in refusing to reverse and in affirming the determination of the Department of Taxation and Finance, State of New York, and the order of the Appellate Division Supreme Court on the grounds that there is no Constitutional objection to the taxation of that portion of the total receipts attributable to mileage without the State of New York.

7. The Court of Appeals of the State of New York erred in refusing to reverse and in affirming the determination of the Department of Taxation and Finance, State of New York, and the order of the Appellate Division Supreme Court on the grounds that Section 186a of the tax law of the State of New York, as construed, did not violate the Constitutional Rights of the Petitioner.

8. The Court of Appeals of the State of New York erred in refusing to hold that Section 186a of the tax law was invalid on the ground of its being repugnant to the Constitution of the United States, Article I, Section 8.

9. The Court of Appeals of the State of New York erred in refusing to hold that Section 186a of the tax law of the State of New York, as construed, was repugnant to the [fol. 87] Constitution of the United States, Article I, Section 8.

10. The Court of Appeals of the State of New York erred in refusing to hold that the tax assessed and

as laid against the Petitioner was repugnant to the Constitution of the United States.

11. The Court of Appeals of the State of New York erred in affirming the conclusions of law found by the New York State Tax Commission as affirmed by the Appellate Division of the Supreme Court that Section 186-a of the law applies to such bus transportation originating and terminating in the State of New York.

12. The Court of Appeals of the State of New York erred in affirming the conclusions of law found by the New York State Tax Commission as affirmed by the Appellate Division of the Supreme Court that Section 186-a, so construed, as applicable to bus transportation originating and terminating in New York State violates neither the Federal or State Constitutions.

13. The Court of Appeals of the State of New York erred in affirming the conclusions of law found by the New York State Tax Commission as affirmed by the Appellate Division of the Supreme Court that the receipts from transportation originating and terminating in the State of New York should not be pro-rated according to the mileage traversed in and out of the State of New York.

Wherefore, on account of the errors hereinabove assigned Petitioner prays that the said judgment, and final order for the Court of Appeals for the State of New York, dated the 23rd day of July 1946, in the above entitled cause be reversed and judgment entered in favor of the appellant.

Dated October 21, 1946.

Bond, Schoeneck & King, Attorneys for Petitioner-Appellant, Office and P. O. Address, 1400 State Tower Building, Syracuse, New York.

[fol. 88] SUPREME COURT OF THE UNITED STATES

CENTRAL GREYHOUND LINES, INC., OF NEW YORK, Petitioner-Appellant;

against

CARROLL E. MEALEY, JOHN F. HENNESSEY and JOSEPH M. MESNIG, constituting the State Tax Commission of the State of New York, Respondents

ORDER ALLOWING APPEAL—October 21, 1946

The petition of Central Greyhound Lines, Inc., of New York, the appellant in the above-entitled cause for an appeal in the above cause to the Supreme Court of the United States from the final order and final judgment of the Court of Appeals for the State of New York, having been filed with the Clerk of this Court and presented herein, accompanied by Assignment of Errors and Statement as to Jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be, and it hereby is, allowed to the Supreme Court of the United States from the final order and final judgment, dated the 23rd day of July, 1946, of the Court of Appeals for the State of New York, as prayed in said petition; and that the Clerk of the Supreme Court of the State of New York, in and for the County of Albany shall within forty days from this date make and transmit to the Supreme Court of the United States, under his hand and seal of said Court, a true copy of the material parts of the record herein which shall be designated by praecipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

[fol. 89] It is further ordered that the said appellant shall give a good and sufficient cost bond in the sum of $500.00, that said appellant shall prosecute said appeal, to effect and answer all costs if it fails to make this plea good.

Dated: October 21, 1946.

John T. Loughran, Chief Judge of the Court of Appeals for the State of New York.

[fols. 90-93] Bond on appeal for $500.00 approved and filed October 25, 1946, omitted in printing.

[fol. 94] Citation in usual form showing service on Nathaniel L. Goldstein omitted in printing.

[fol. 95] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION CONCERNING RECORD—Filed November 27, 1946

It is hereby stipulated by and between the attorneys for the above named Petitioner-Appellant and the above named Respondents-Appellees that the following shall constitute the portions of the record, in the above entitled matter, to be included in the transcript:

1. The printed record on appeal in the Court of Appeals State of New York, consisting of 67 pages, said record being the record on appeal before the Court of Appeals, State of New York, upon which an opinion was rendered by that Court in 296 N. Y. 18 (decided July 23, 1946).

2. All motion papers captioned in the Appellate Division, Third Department, on the application of the above named Petitioner-Appellant, for leave to appeal to the Court of Appeals, said application being denied by an order entered in the office of the clerk of the Appellate Division on January 14, 1944.

3. All motion papers captioned in the Court of Appeals on the application of the above named Petitioner-Appellant, for leave to appeal to the Court of Appeals, said application being granted by an order of the said Court of Appeals, dated March 2, 1944.

[fol. 96-97] 4. The remittitur of the Court of Appeals dated July 23, 1946, and the order on said remittitur dated August 2, 1946, filed in the Office of the Clerk of the County of Albany, on August 2, 1946.

5. The Notice of Motion dated October 3, 1946, together with the petition verified the same date on the application for an order to amend the remittitur and for the further

relief requested in said petition, and the affidavit in opposition thereto.

6. The Order of the Court of Appeals dated October 15, 1946, denying the motion for re-argument and amending the remittitur by the inclusion of the specific language therein set forth.

Dated November 25, 1946, Syracuse, New York.

Bond, Schoeneck & King, Attorneys for Petitioner-Appellant. Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Respondents-Appellees.

[fol. 98] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 745

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed December 9, 1946

Comes now the appellant in the above entitled cause and states that it adopts its Assignment of Errors, dated October 21, 1946, duly filed in the office of the Clerk of this Court, as its Statement of the Points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated December 7, 1946.

Edward Schoeneck, Counsel for Appellant, Central Greyhound Lines, Inc. of N. Y. Office & Post Office Address, 1400 State Tower Building, Syracuse, New York.

[fol. 99] STATE OF NEW YORK,
County of Onondaga,
City of Syracuse, ss:

Tracy H. Ferguson, being duly sworn, deposes and says: That on the 7th day of December, 1946, he served the annexed Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed, in the above-entitled action, on Nathaniel L. Goldstein, Attorney Gen-

eral, Albany, New York, by enclosing a true and correct copy of said Statement and Designation in a securely sealed, postpaid envelope addressed to said Attorney General at his post office address, Albany, New York, and depositing the same in a mail chute regularly maintained by the United States Government in the State Tower Building, Syracuse, New York.

Tracy H. Ferguson.

Sworn to before me this 7th day of December, 1946.
Chester H. King, Jr.

[fol. 100] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 745

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—December 23, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits. The case is transferred to the summary docket.

Endorsed on cover: File No. 51,609, New York Court of Appeals, Term No. 745. Central Greyhound Lines, Inc., of New York, Appellant, vs. Carroll E. Mealey, John F. Hennessey and Joseph M. Mesnig, Constituting the State Tax Commission of the State of New York. Filed December 5, 1946. Term No. 745 O. T. 1946.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 745 14

CENTRAL GREYHOUND LINES, INC., OF NEW YORK,

Appellant,

vs.

CARROLL E. MEALEY, JOHN F. HENNESSEY AND JOSEPH M. MESNIG, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

GEORGE H. BOND,
EDWARD SCHOENECK,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 745

CENTRAL GREYHOUND LINES, INC., OF NEW YORK,

Petitioner-Appellant,

vs.

CARROLL E. MEALEY, JOHN F. HENNESSEY AND JOSEPH M. MESNIG, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Respondents

STATEMENT AS TO JURISDICTION

The Petitioner-Appellant, above named, respectfully submits the following Jurisdictional Statement pursuant to Rule 12:

1. The Statutory provision which the Petitioner-Appellant believes sustains the jurisdiction of this Court is Section 237(a) of the Judicial Code of the United States (28 U. S. C. A. Section 344-a), and the statute of New York State, the validity of which is involved, is Section 186-a of the Tax Law of the State of New York, a verbatim copy of said section being attached hereto and made a part of this Jurisdictional Statement as if set forth in this para-

graph. The date of the final order and final judgment sought to be reviewed in the above cause is July 23, 1946, and the date upon which the application for the appeal is presented is October 21, 1946.

2. The nature of the cause and the rulings of the Court below were and are such as to bring this case within the jurisdictional provisions hereinbefore set forth, as is set forth more fully hereinafter.

3. That by a petition, dated and verified February 16, 1943, the petitioner before the Supreme Court, State of New York, Albany County, prayed for relief and for Court review of a determination made by the respondents, constituting the State Tax Commission of the State of New York, and requested that the Court direct the respondents to cancel an assessment, purportedly made under the wording of Section 186-a of the Tax Law of the State of New York, in its entirety or, in the alternative, reduce the sum by 42.53%; that said petition set forth the following allegations: That the petitioner was engaged in business as a common carrier, and that it operated omnibuses both within and without the State of New York, and that additional taxes were assessed upon the gross income of the petitioner from sales and transportation services in interstate commerce originating and terminating within the State of New York and consumed and used partly within the States of New Jersey and Pennsylvania, that the petitioner had established by competent proof before the Department of Taxation & Finance upon a hearing held pursuant to a petition filed with such Department, that the additional tax was based upon sales of transportation services in interstate commerce originating and terminating within the State of New York but consumed and used partly within the States of New Jersey and Pennsylvania, and that the revenue from such services for the month of July, a month chosen

on the basis of a stipulation attributable to the mileage consumed in the State of New York was 57.47% of the total revenue received for such services, that the respondents refused to cancel or reduce the assessment but affirmed the same by its decision dated January 27, 1943; that the said petition specifically set forth that the determination of the Commission made January 27, 1943 was contrary to statute, was unconstitutional, and was illegal and erroneous in that any assessment upon income of the petitioner from the sales of transportation services in interstate commerce originating and terminating within the State of New York but consumed and used partly within the States of New Jersey and Pennsylvania, was illegal and void and was not authorized by statute, and that if any portion of the income was subject to tax under Section 186-a of the Tax Law, the income from services consumed and used within the States of New Jersey and Pennsylvania must be eliminated therefrom.

4. That in its original petition before the Department of Taxation & Finance, petitioner alleged that the additional taxes were being assessed upon gross income of the petitioner from sales of transportation services in interstate commerce originating and terminating within the State of New York but consumed and used partly within the States of New Jersey and Pennsylvania, and that any assessment upon such income was not authorized by statute and was illegal and void.

5. That upon the petition filed in the Supreme Court, State of New York, Appellate Division, Third Department, a return was filed by the respondents which denied that the transportation referred to in the petition constituted interstate commerce, and said return alleged that the tax referred to in the petition and affirmed by the Commission's determination was lawfully assessed. (The references to

the petitioner's petition in the Supreme Court, Appellate Division, Third Department (originally before the Supreme Court, County of Albany, but transferred by subsequent order under the provisions of Section 1296 of the Civil Practice Act) are found in the printed record on appeal before the Court of Appeals at pp. 5-10; to the petitioner's petition before the Department of Taxation & Finance at pp. 25-26; to the answer and return of the respondents at pp. 11-13.)

6. The Supreme Court, Appellate Division, after hearing oral argument, handed down its opinion and decision dated November 10, 1943, a copy of which is appended hereto and made a part hereof as if fully set forth in this paragraph, and an order of affirmance was entered September 13, 1943. (References to the proceedings of the Supreme Court, Appellate Division, are found at pp. 60-66 of the printed record on appeal in the Court of Appeals.) The opinion of the Supreme Court, Appellate Division, which appears in the Official Reporter at 266 A. D. 648, set forth that your petitioner argued that if receipts from the sale of utility services for use partly within and partly without the State are taxable under Section 186-a of the Tax Law, when the journey originates and terminates in New York State, then the tax must be limited to the revenue attributable to the mileage in New York State, "* * * otherwise the statute is unconstitutional and a violation of the interstate commerce provision of the Federal Constitution" (fols. 193-194 of the printed record on appeal in the Court of Appeals). The Supreme Court, Appellate Division, further added that the "journeys", referred to in the opinion, have been held "not to be interstate commerce" (fol. 195 of the printed record on appeal in the Court of Appeals), citing the cases of *Lehigh Valley Railway* v. *Commonwealth of Pennsylvania*, 145 U. S. 192; *People ex rel. Cornell Steamboat Com-*

pany v. *Sohmer*, 235 U. S. 549. The Supreme Court, Appellate Division, concluded, with reference to the argument of the petitioner, as follows:

> "In the light of the federal decisions, we see no merit to the contention of petitioner that Section 186-a of the Tax Law, as above construed, is a violation of the interstate commerce clause of the Federal Constitution" (fol. 197 of the printed record on appeal in the Court of Appeals).

That Court further stated that since the tax was measured by gross income, it was not a burden upon the particular business of the petitioner (fol. 198 of the printed record on appeal in the Court of Appeals).

7. The petitioner thereafter applied for leave to appeal to the Court of Appeals before the Appellate Division of the Supreme Court and such leave was denied, 267 A. D. 841, but thereafter, on March 2, 1944, the Court of Appeals for the State of New York issued an order granting leave to appeal to the Court of Appeals (fols. 175-177 of the printed record on appeal in the Court of Appeals; 292 N. Y. 723).

8. The cause was argued before the Court of Appeals for the State of New York on June 6, 1946, and the cause was decided on July 23, 1946, and the Court of Appeals handed down an opinion on that date (official citation not yet available), a copy of which is appended hereto and made a part hereof as if fully set forth in this paragraph; that the Court of Appeals stated in such opinion:

> "There is no constitutional objection to taxation of the total receipts here. This is not interstate commerce (Lehigh Valley case, supra; People ex rel. Cornell Steamboat Co., 235 U. S. 549; Ewing *vs.* Leavenworth, 226 U. S. 464.)"

That on October 15, 1946, upon application of your petitioner, the Court of Appeals denied a motion for re-argument but amended the remittitur by adding thereto the following statement:

> "A question under the Federal Constitution was presented and passed upon by this Court, viz. whether Section 186-a of the Tax Law of the State of New York, as construed by the Tax Commission, is repugnant to the interstate commerce provision of the Federal Constitution, Article I, Section 8. This court held that the aforesaid statute as so construed is not repugnant to that provision of the Federal Constitution."

9. That the questions involved in this cause are substantial, and the issues involve matters of far-reaching effect, and it is only by the determination of the Supreme Court of the United States that the issues can be determined conclusively and finally, not alone as they affect your petitioner but all those engaged in similar occupation and in operations which involve the transportation of passengers across State lines; that the questions involved are substantial is substantiated by the fact that the Court of Appeals for the State of New York granted leave to appeal to that Court, based in part upon the application of the petitioner, which pointed out that the geographical location of New York City is such that a large volume of traffic between that city and the central and western parts of the State of New York passes through New Jersey and Pennsylvania, and that no case had been found decided by the highest Court of the State of New York interpreting the particular provision of Section 186-a of the Tax Law, and that a decision in this matter, affecting as it does such a large volume of business, involves a question of law which ought to be reviewed.

10. That your petitioner is of the firm belief that if the present decision of the Court of Appeals in the case at bar

shall stand, without review, then the decisions of the Supreme court of the United States in *Lehigh Valley Ry.* v. *Pennsylvania*, 145 U. S. 192, and *Hanley* v. *Kansas City So. Ry. Co.*, 187 U. S. 617 and *United States Express Co.* v. *Minnesota*, 223 U. S. 335, will, in effect, be overruled by the decision of the Court of Appeals; whereas if a further review be made, a determination by the Supreme Court of the United States on the question will it is believed, result in a reversal of the judgment below and the sustaining of the previous decisions of the Supreme Court of the United States, or, in the alternative, if the decision of the Supreme Court of the United States on this matter shall be adverse to your petitioner, then the Supreme Court of the United States will have made the determination that its own prior decisions are to be overruled.

11. That the issues raised in this cause, as set forth in the foregoing statements, are of tremendous importance not alone to the petitioner, but to all those engaged in the business of transportation, and in the absence of a final determination by ultimate authority, as the Supreme Court of the United States, the obligations and responsibilities of persons such as the petitioner are left undefined, dependent upon several independent litigations under the several Courts of the United States.

12. That the issues raised in this cause, as set forth in the foregoing statements and as further appear from the opinion of the Court of Appeals for the State of New York in the case at bar, involve questions which are substantial; that Court of Appeals in the opinion below, sought to distinguish the cases upon which the appellant relied, of *Lehigh Valley Ry.* v. *Pennsylvania*, 145 U. S. 192; *United State Express Co.* v. *Minnesota*, 223 U. S. 335; *State of Minnesota* v. *United States Express Co.*, 114 Minn. 346;

Hanley v. *Kansas City So. Ry. Co.*, 187 U. S. 617; that the net effect of the Court of Appeals opinion is that the Supreme Court cases, just cited, are not authorities for the appellant's position. It was, and is, the view of your petitioner that in the Supreme Court cases just cited, the Supreme Court of the United States has clearly expressed at least a substantial doubt as to the power of a State to tax gross receipts from the transportation business of the character involved in the case at bar, so far as the tax might have been applied to receipts from mileage without the State; that such was the interpretation the Supreme Court of the State of Minnesota placed upon the United States Supreme Court's decision in the cases of *Lehigh Valley Ry.* v. *Pennsylvania*, 145 U. S. 192, and *Hanley* v. *Kansas City So. Ry. Co.*, 187 U. S. 617, for in the case of *State of Minnesota* v. *United States Express Co.* (114 Minn. 346), the Court stated with respect to this identical problem:

> "We interpret the decision (The Lehigh Valley decision) as allowing a recovery of taxes upon that proprotion of the earnings derived from the carriage wholly within the state. This seems to us the safer rule and avoids any question of taxing interstate commerce, and we adopt and apply it to this case."

that the United States Supreme Court agreed with this decision of the Supreme Court of Minnesota and stated:

> "As to such shipments, the Supreme Court held that 9 per cent of the taxes claimed on this class of earnings should be deducted from the amount of the recovery allowed in the court of original jurisdiction, since it was disclosed that only 91 per cent of the mileage was within the state. For this part of the decision the Minnesota court relied upon Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 1 Inters. • • • An examination of that case shows that it is

decisive of the present one on this point, and we need not further discuss this feature of the case."

(223 U. S. 335); that the case of *People ex rel. Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549, which involved a different taxing statute and upon which the Court of Appeals below relied is readily distinguishable, because in that case the taxpayer failed to show, though the opportunity was afforded to it before the State Tax Commission, the portion of the revenue attributable to its towings outside of the State of New York. On the basis of the *Lehigh Valley* case (145 U. S. 192) such a showing was a prerequisite to the taxpayer's obtaining relief; that in the case at bar, there is a specific finding by the New York State Tax Commission that the petitioner received from bus transportation originating and terminating in the State of New York but traversing without the State of New York for some portion of the journey, the sum of $84,412.31 (for the month of July, 1937, a month chosen as a basis for decision —Folio 130 of the printed record on appeal in the Court of Appeals), and that 57.47 per cent of the total mileage of such journeys was traversed within the State of New York and 42.53 per cent of such total mileage was traversed without the State of New York (Folio 163 on appeal in the Court of Appeals).

WHEREFORE, the Petitioner-Appellant prays for the allowance of an appeal from the Court of Appeals for the State of New York, the highest Court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final order and final judgment of the Court of Appeals for the State of New York may be examined and reversed; and your Petitioner-Appellant further prays that on account of the errors hereinbefore assigned, the final order and judgment of the

Court of Appeals for the State of New York, dated July 23, 1946, in the above-entitled cause be reversed and judgment entered in favor of this Petitioner-Appellant.

Dated October 21, 1946.

GEORGE H. BOND,
EDWARD SCHOENECK,
Counsel for Appellant.

APPENDIX "A"

COURT OF APPEALS

CENTRAL GREYHOUND LINES, INC., of New York, *Appellant*,

v.

CARROLL E. MEALEY, et al., Constituting the State Tax Commission, Respondents

Decided July 23, 1946

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 13, 1943, in a proceeding under Article 78 of the Civil Practice Act (transferred to the Appellate Division by an order of the Supreme Court at Special Term, entered in Albany County) which unanimously confirmed a determination of the State Tax Commission affirming an assessment of an additional tax (entitled "Emergency Tax on the Furnishing of Utility services").

Charles A. Schoeneck for appellant.

Nathaniel L. Goldstein, Attorney-General (John C. Crary, Jr., and Wendell P. Brown of counsel), for respondents.

CONWAY, J. There is presented for construction a part of section 186-a of the Tax Law. That section imposes an emergency tax of 2% upon the gross income of every utility doing business in this state which is subject to the supervision of the State Department of Public Service and which has an annual gross income in excess of $500. The petitioner is a corporation engaged in business as a common carrier by omnibus and subject to the supervision of the Public Service Commission. It operates omnibuses, both within and without the state. Subdivison 2, section (a) provides that the word "utility" includes every person subject to the supervision of the state department of public service with certain exceptions not material here. Subdivision 2, section (b) provides that the word "person" includes corporations.

Subdivision 2, section (c) provides: "The words 'gross income' mean and include receipts received in or by reason of any sale * * * made or service rendered for ultimate consumption or use by the purchaser in this state * * *."

The State Tax Commission included within petitioner's gross income, for the purpose of computing the emergency tax, receipts from sales of tickets for certain journeys which originated and terminated in New York State but which went through New Jersey and Pennsylvania. At the hearing before the Commission, the proof was limited to figures for July, 1937, with the stipulation that the result should be applicable to all the assessments for which application for revision had been filed.

The regular route of the busses of this company traveling between New York City and cities and villages in upstate New York is through New Jersey and Pennsylvania. A passenger who wishes to go to New York City from Buffalo, for instance, buys a single ticket marked "Buffalo to New York City". The bus travels within this State from Buffalo to Elmira; en route from Elmira to Towanda, Pennsylvania, it crosses the Pennsylvania State line and continues through Pennsylvania to Scranton. En route from Scranton, it crosses the New Jersey State line and continues through New Jersey to the Holland or Manhattan Tunnel and into New Jersey City.

Petitioner's Exchange 7 (pp. 45-51 of the record), entitled "Receipts from Interstate Business Which Originates and Terminates in New York State", breaks down the total receipts of July, 1937, for journeys originating and terminating in New York State into two figures: $84,431 which represents receipts for total mileage covered on these trips, and $48,508.97 which represents receipts for mileage covered within New York State on these trips. Receipts for journeys which begin at a point in New York State and terminate at a point outside of the State, or the reverse, are not included in this controversy.

The contention of the petitioner at the hearing before the Commission was that gross income to be taxed under this statute, if any, is limited to receipts representing mileage covered within New York State. The assessment of $1,688.24 made by the Commission on the basis of total

receipts for these journeys was affirmed upon the hearing. It was stipulated that the Commission found that (1) 42.53% of the total mileage of such journeys was traversed without the State, and 57.47% within the state; (2) that § 186-a of the Tax Law applies to bus transportation originating and terminating in this State; (3) that § 186-a so construed violates neither the Federal nor State Constitutions; and (4) that the receipts from such transportation should not be prorated according to the mileage traversed in and out of this State.

Petitioner advances two arguments. The first is that the language of section 186-a includes within "gross income" receipts for sales made or service rendered for ultimate consumption or use by the purchaser in this State, but does not include sales made or service rendered for consumption or use partly within and partly without the State. Petitioner argues that the word "ultimate" has no reference to the point of destination in transportation and may therefore be disregarded. It explains that that word was used in order to make the tax applicable to the resale of utility services by the original purchaser of such service (for instance, submeters), and at the same time to avoid pyramiding of taxes which would result from taxation of both wholesale and retail sales. There seems no reason to doubt this explanation of the word "ultimate" so far as it refers to submeterers. Indeed, the "Declaration of legislative intent" which accompanied the amendment of section 186-a in 1941 (L. 1941, c. 137, § 1) states: "It was intended to include persons and corporations which were directly in competition with ordinary utilities, such as, landlords and submeterers, who buy their services from other utilities and, in turn, resell such services. For that reason the tax was imposed on receipts from sales to ultimate consumers. Receipts from the sale of such utility services to submeterers were not taxed, but receipts of submeterers from their own customers were intended to be taxed."

However, that aspect of the use of the word "ultimate" does not render it necessary to ignore the word entirely in relation to transportation. Nor do I think the Legislature intended such a result. Subdivision 1 of the section dis-

tinguishes between utilities subject to the supervision of the department of public service and utilities not so subject. Submeterers and landlords are not subject to the supervision of the department of public service, but they are taxable under this statute. (Matter of Lacidem Realty Corp. *v.* Graves, 228 N. Y. 354.) A 2% tax of its "gross income" is imposed on every utility subject to the supervision of the department of public service; a 2% tax is also imposed on the "gross operating income" of "every other utility doing business in this state." Subdivision 2, section (c) defines "gross income" (which, as used in subd. 1, refers only to income of utilities under the supervision of the department, to which class petitioner belongs) as including receipts for "any sale * * * made or service rendered for ultimate consumption or use in this state." Subdivision 2, section (d) defines "gross operating income" (which, as used in subd. 1, refers to income of those not under the supervision of the department, to which class submeterers and landlords belong) as including receipts for any "sale * * * made for ultimate consumption or use" or for "furnishing for such consumption or use * * * in this state." Thus it appears that the word "ultimate" is used in both cases.

Petitioner also points out that "§ 186-a is not the first law of this State imposing a tax upon the gross income of utilities engaged in the transportation business. It cites Section 184 of the Tax Law which imposes a franchise tax on transportation and transmission corporations and associations. That statute includes within "gross earnings" "earnings from transportation or transmission business originating and terminating within this state" but excludes "earnings derived from business of an interstate character." Petitioner argues that since section 186-a does not use the phrase "earnings derived from business originating and terminating within this state," section 186-a excepts this type of business from taxation.

We do not think it necessary to attempt to interpret section 186-a in the light of the language of section 184. It is not shown that the two sections are related in any way. Section 184 has been in force with frequent amendments since 1880. It imposes a franchise tax on corporations

doing a particular kind of business: transportation or transmission. Section 186-a, in force since 1937, imposes an emergency tax on a great number of different utility services. We think that the language of the latter is broad enough to include the kind of business in issue here, and that it was not necessary in a statute which was made applicable to such a wide field to use the specific words used in section 184 in relation to transportation corporations.

Even aside from the use of the word "ultimate," we do not agree with petitioner's assertion that the service it renders in this transportation is consumed or used partly within and partly without the State. The Appellate Division pointed that out clearly.

The second argument of petitioner is that, if the statute is construed to tax this kind of business, it should be construed to tax only that proportion of receipts attributable to mileage within this State. Its petition in the Supreme Court alleged that a construction of section 186-a which includes within gross income the total receipts for these trips is "contrary to statute and unconstitutional," but petitioner does not urge here that such construction is unconstitutional. It states that the question is not one of constitutional taxing power but of statutory construction. It relies upon Lehigh Valley Ry. *v.* Pennsylvania (145. U. S. 192); United States Express Co. *v.* Minnesota, 223 U. S. 335; and Hanley *v.* Kansas City So. Ry. Co. (187 U. S. 617) as indicating that the statute ought to be limited to receipts for mileage covered within this State. It should be noted here that the petitioner cites one case where the United States Supreme Court has held that a tax on tranportation originating and terminating in one State, but passing through another State, must be limited to receipts for mileage covered within the State of origin and terminus. In the Lehigh Valley case, the State court had upheld a tax imposed on a railroad corporation, based on receipts for continuous transportation beginning and ending in Pennsylvania but passing through New Jersey. It appears that only that portion of transportation which was within Pennsylvania was taxed. The railroad objected to the tax on the ground that the transportation was interstate

commerce. The question before the Supreme Court was "* * * simply whether, in the carriage of freight and passengers between two points in one State, the mere passage over the soil of another State renders that business foreign which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk."

In State of Minnesota *v.* United States Express Co. (114 Minn. 346, 131 N. W. 489), a tax construed as a property tax was levied against the total transportation business done by defendant within the State. The Supreme Court of Minnesota held following the Lehigh case, that transportation originating and terminating in Minnesota but passing through another State was not interstate commerce. It then limited the tax, however, to the mileage within the State, saying: "This seems to us the safer rule and avoids any question of taxing interstate commerce * * *." When the case reached the United States Supreme Court it was affirmed (223 U. S. 335). It is not accurate to say that the Minnesota Court held that the Lehigh case required that the tax be limited to revenue from mileage within the State, and that the Supreme Court affirmed that holding. As in the Lehigh case, the appellant in the Supreme Court objected to the taxation of any of the transportation which originated and terminated in Minnesota but passed through another State, on the ground that that kind of business was interstate commerce. The Supreme Court cited the Lehigh case as controlling on this issue, not on the question of whether the tax should be prorated. It does not appear that the latter question was before the court.

Hanley *v.* Kansas City So. Ry. Co. (187 U. S. 617), cited by petitioner, is not applicable here, since it determined only that commerce extending from one State to another may not be regulated by either State; it specifically distinguished the Lehigh case as an example of State taxing power.

There is no constitutional objection to taxation of the total receipts here. This is not interstate commerce

(Lehigh Valley case, supra; People ex. rel. Cornell Steamboat Co. *v.* Sohmer, U. S. 549; Ewing *v.* Leavenworth, 226 U. S. 464); and, since we think that this service is "service rendered for ultimate consumption or use by the purchaser in this state," we see no reason why the statute should be construed to limit the tax to receipts attributable to mileage covered within this State in the course of continuous transportation between points in this State.

The order should be affirmed with costs.

Loughran, Ch. J., Lewis, Desmond, Thacher and Fuld, JJ., concur; Dye, J., taking no part.

Order affirmed.

APPENDIX "B"

In the Matter of CENTRAL GREYHOUD LINES, INC., of New York, Petitioner, against CARROLL E. MEALEY et al., Constituting the State Tax Commission, Respondents.

Third Department, November 10, 1943.

Proceeding under article 78 of the Civil Practice Act (transferred to the Appellate Division of the Supreme Court in the third judicial department by an order of a Special Term, Albany County) to review a determination of respondents, constituting the State Tax Commission, denying revision of an assessment of additional taxes against petitioner under section 186-a of the Tax Law.

Bond, Schoeneck & King, attorneys (Lyle Hornbeck of counsel) for petitioner.

Nathaniel L. Goldstein, Attorney-General (Wendell P. Brown, First Assistant Attorney-General and John C. Crary, Jr., Assistant Attorney-General, of counsel), for respondents.

BLISS, J. The facts are undisputed. Petitioner, a New York corporation, is a utility engaged in the business of a common carrier by omnibus subject to the supervision of the New York State Department of Public Service. A portion of its business consists of transporting passengers from points in New York State to destinations in New York

State over routes which lie in part in an adjoining State or States.

Section 186-a of the Tax Law imposes an emergency tax equal to two per cent of its gross income upon every utility doing business in this State which is subject to the supervision of the State Department of Public Service, having an annual gross income in excess of $500. The words "gross income" are defined by this statute to "mean and include receipts received in or by reason of any sale * * * made or service rendered for ultimate consumption or use by the purchaser in this state * * *."

The petitioning utility contends first that its business of transporting passengers between termini, both of which are in New York State over routes which lie in part in an adjoining State or States, is not the rendering of service for ultimate consumption or use by the purchaser in this State. It argues further that if receipts from the sale of utility services for use partly within and partly without the State are taxable under section 186-a when the journey originates and terminates in New York State, then the tax must be limited to the revenue attributable to the mileage in New York State, otherwise the statute is unconstitutional and a violation of the interstate commerce provision of the Federal Constitution.

It is to be noted first that the emergency tax imposed by section 186-a is laid upon the utility for the privilege of doing business within New York State. It is measured by the gross income of the utility received in or by reason of any sale made or service rendered for ultimate consumption or use by the purchaser in this State. The tickets entitling the passengers for the journeys here in dispute are apparently all sold and payment therefor received within New York State. The journeys contracted for begin and end in this State. Similar journeys of freight or passengers have been held not to interstate commerce. (Lehigh Valley Railroad *v.* Pennsylvania, 145 U. S. 192; Cornell Steamboat Co. *v.* Sohmer, 235 U. S. 549.) It is a mere incident of continuous journey between two points in New York State if a portion of the journey happens to lie within an adjoining State. What the passenger desires

and the utility contracts to furnish is transportation from one point in New York State to another point in this State. His principal object is transportation between the termini. It is a matter of geography if physical or other reasons impel the utility to follow a route partly through another State. It is a service rendered to the purchaser in this State. If the journey were made in two or more distinct parts with definite interruptions in another State so that it composed two or more journeys instead of one, the situation would be quite different. The income received from the services here in question comes within the statutory definition of gross income.

In light of the Federal decisions we see no merit to the contention of petitioner that section 186-a of the Tax Law as above construed is a violation of the interstate commerce clause of the Federal Constitution. As stated above, this kind of transportation is not interstate commerce. (Cornell Steamboat Co. *v.* Sohmer, 235 U. S. 549; Lehigh Valley Railroad *v.* Pennsylvania, 145 U. S. 192.)

Finally, this is a tax against a certain corporation for the privilege of doing business in New York State. It is measured by its gross income. Consequently it is not a burden upon the particular business here sought to be exempted.

The determination should be in all respects confirmed, with fifty dollars costs and disbursements.

All concur.

Determination in all respects confirmed, with fifty dollars costs and disbursements.

APPENDIX "C"

Section 186-A of the New York State Tax Law

Emergency tax on the furnishing of utility services

(First enacted by Chapter 321 of Laws of 1937)

1. Notwithstanding any other provision of this chapter, or of any other law, a tax equal to two per centum of its gross income for the period from July first, nineteen hun-

dred thirty-seven, to March thirty-first, nineteen hundred forty-four,* is hereby imposed upon every utility doing business in this state, which is subject to the supervision of the state department of public service which has a gross income for the twelve months ending May thirty first in excess of five hundred dollars, except motor carriers or brokers subject to such supervision under article three-b of the public service law and a tax equal to two per centum of its gross operating income is hereby imposed for the same period upon every other utility doing business in this state which has a gross operating income for the twelve months ending May thirty-first in excess of five hundred dollars, which taxes shall be in addition to any and all other taxes and fees imposed by any other provision of law for the same period.

2. As used in this section, (a) the word "utility" includes every person subject to the supervision of either division of the state department of public service, except persons engaged in the business of operating or leasing sleeping and parlor railroad cars or of operating railroads other than street surface, rapid transit, subway and elevated railroads, and also includes every person (whether or not such person is subject to such supervision) who sells gas, electricity, steam, water, refrigeration, telephony or telegraphy, delivered through mains, pipes, or wires, or furnishes gas, electric, steam, water, refrigerator, telephone or telegraph service, by means of mains, pipes, or wires; regardless of whether such activities are the main business of such person or are only incidental thereto, or of whether use is made of the public streets; (b) the word "person" means persons, corporations, companies, associations, joint-stock associations, co-partnerships, estates, assignee of rents, any person acting in a fiduciary capacity, or any other entity, and persons, their assignees, lessees, trustees or receivers, appointed by any court whatsoever, or by any other means, except the state, municipalities, political and civil subdivisions of the state or municipality, and public districts;

* The date was last extended by Chapter 110 of Laws of 1946 to March 31st, 1947.

(c) the words "gross income" mean and include receipts received in or by reason of any sale, conditional or otherwise (except sales hereinafter referred to with respect to which it is provided that profits from the sale shall be included in gross income), made or service rendered for ultimate consumption or use by the purchaser in this state, including cash, credits and property of any kind or nature (whether or not such sale is made or such service is rendered for profit), without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expense whatsoever; also profits from the sale of securities; also profits from the sale of real property growing out of the ownership or use of or interest in such property; also profit from the sale of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the period for which a return is made); also receipts from interest, dividends, and royalties, derived from sources within this state other than such as are received from a corporation a majority of whose voting stock is owned by the taxpaying utility, without any deduction therefrom for any expenses whatsoever incurred in connection with the receipt thereof, and also profits from any transaction (except sales for resale and rentals) within this state whatsoever; and (d) the words "gross operating income" mean and include receipts received in or by reason of any sale, conditional or otherwise, made for ultimate consumption or use by the purchaser of gas, electricity, steam, water, refrigeration, telephony or telegraphy, or in or by reason of the furnishing for such consumption or use of gas, electric, steam, water, refrigerator, telephone or telegraph service in this state, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expenses whatsoever.

3. Every utility subject to tax under this section shall keep such records of its business and in such form as the tax commission may require, and such records shall be

preserved for a period of three years, except that the tax commission may consent to their destruction within that period or may require that they be kept longer.

4. (See also subd. 4 below.) Every utility subject to tax hereunder shall file, on or before September twenty-fifth, December twenty-fifth, March twenty-fifth, and June twenty-fifth, a return for three calendar months preceding each such return date including any period for which the tax imposed hereby or by any amendment hereof is effective, each of which returns shall state the gross income or gross operating income for the period covered by each such return. Returns shall be filed with the tax commission on a form to be furnished by it for such purpose and shall contain such other data, information or matter as the tax commission may require to be included therein. Notwithstanding the foregoing provisions of this subdivision, any utility whose average gross income or average gross operating income, as the case may be, for the aforesaid three months' periods is less than fifteen hundred dollars, may file its return for such periods on June twenty-fifth, nineteen-hundred thirty-nine, June twenty-fifth, nineteen hundred forty, June twenty-fifth, nineteen hundred forty-one, June twenty-fifth, nineteen hundered forty-two, June twenty-fifth, nineteen hundred forty-three, and June twenty-fifth, nineteen hundred forty-four, respectively. The tax commission, in order to insure payment of the tax imposed by this section, may require at any time a return, which shall contain any data specified by it. Every return shall have annexed thereto an affidavit of the head of the utility making the same, or of the owner or of a co-partner thereof, or of a principal officer of the corporation, if such business be conducted by a corporation, to the effect that the statements contained therein are true.

4. (See also subd. 4 above.) Every utility subject to tax hereunder shall file, on or before September twenty-fifth, December twenty-fifth, March twenty-fifth, and June twenty-fifth, a return for the three calendar months preceding each such return date including any period for which the tax imposed hereby or by any amendment hereof

is effective, each of which returns shall state the gross income or gross operating income for the period covered by each such return. Returns shall be filed with the tax commission on a form to be furnished by it for such purpose and shall contain such other data, information or matter as the tax commission may require to be included therein. Notwithstanding the foregoing provisions of this subdivision, any utility whose average gross income or average gross operating income, as the case may be, for the aforesaid three months' periods is less than fifteen hundred dollars, may file its returns for such periods on June twenty-fifth, nineteen hundred thirty-nine, June twenty-fifth, nineteen hundred forty, June twenty-fifth, nineteen hundred forty-one, June twenty-fifth, nineteen hundred forty-two, and June twenty-fifth, nineteen hundred forty-three, respectively, and the tax commission may require any utility to file an annual return, which shall contain any data specified by it, regardless of whether the utility is subject to tax under this section. Every return shall have annexed thereto an affidavit of the head of the utility making the same, or of the owner or of a co-partner thereof, or of a principal officer of the corporation, if such business be conducted by a corporation, to the effect that the statements contained therein are true.

5. At the time of filing a return as required by this section, each utility shall pay to the tax commission the tax imposed by this section for the period covered by such return. Such tax shall be due and payable at the time of filing the return or, if a return is not filed when due, on the last day on which the return is required to be filed.

6. In case any return filed pursuant to this section shall be insufficient or unsatisfactory to the tax commission, and if a corrected or sufficient return is not filed within twenty days after the same is required by notice from the tax commission, or if no return is made for any period, the tax commission shall determine the amount of tax due from such information as it is able to obtain, and, if necessary, may estimate the tax on the basis of external indices or otherwise. The tax commission shall give notice of such determination to the person liable for such tax. Such deter-

mination shall finally and irrevocably fix such tax, unless the person against whom it is assessed shall, within thirty days after the giving of notice of such determination, apply to the tax commission for a hearing, or unless the tax commission, of its own motion shall reduce the same. After such hearing, the tax commission shall give notice of its decision to the person liable for the tax. The decision of the tax commission may be reviewed by certiorari, if application therefor is made within thirty days after the giving of notice of such decision. An order of certiorari shall not be granted unless the amount of any tax sought to be reviewed, with penalties thereon, if any, shall be first deposited with the tax commission and an undertaking filed with it, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that, if such order be dismissed or the tax confirmed, the applicant for the order will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding, or at the option of the applicant, such undertaking may be in a sum sufficient to cover the tax, penalties, costs and charges aforesaid, in which event the applicant shall not be required to pay such tax and penalties as a condition precedent to the granting of such order.

7. The same remedies shall be available for the recovery of any tax or penalty imposed by this section as are available for the recovery of other taxes and penalties imposed by this article.

8. Any notice authorized or required under the provisions of this section may be given by mailing the same to the person for whom it is intended, in a postpaid envelope, addressed to such person at the address given by him in the last return filed by him under this section, or, if no return has been filed, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time, which is determined according to the provisions of this section by the giving of notice, shall commence to run from the date of mailing of such notice.

9. Any person failing to file a return or corrected return, or to pay any tax on any portion thereof, within the time required by this section shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof, excepting the first month, after such return was required to be filed or such tax became due; but the tax commission, if satisfied that the delay was excusable, may remit all or any portion of such penalty.

10. If, within one year from the payment of any tax or penalty, the payer thereof shall make application for a refund thereof and the tax commission or the court shall determine that such tax or penalty or any portion thereof was erroneously or illegally collected, the tax commission shall refund the amount so determined. For like cause and within the same period, a refund may be so made on the initiative of the tax commission. However, no refund shall be made of a tax or penalty paid pursuant to a determination of the tax commission as hereinbefore provided unless the tax commission, after a hearing as hereinbefore provided, or of its own motion, shall have reduced the tax or penalty or it shall have been established in a certiorari proceeding that such determination was erroneous or illegal. All refunds shall be made out of moneys collected under this article deposited to the credit of the comptroller, with the approval of the comptroller. An application for a refund, made as hereinbefore provided, shall be deemed an application for the revision of any tax or penalty complained of and the tax commission may receive additional evidence with respect thereto. After making its determination, the tax commission shall give notice thereof to the person interested, and he shall be entitled to a certiorari order to review such determination, subject to the provisions hereinbefore contained relating to the granting of such an order.

11. If any provisions of this section conflicts with any other provision contained in this article, the provision of this section shall control, but the provisions of this article which do not conflict with the provisions of this section shall

apply with respect to the taxes under this section, so far as they are, or may be made applicable.

12. The tax imposed by this section shall be charged against and be paid by the utility and shall not be added as a separate item to bills rendered by the utility to customers or others but shall constitute a part of the operating costs of such utility.

13. Notwithstanding any other provision contained in this or any other law, in the event the city of New York shall enact a local law imposing a tax on utilities, such as is imposed by this section, except as to the rate of tax, the tax commission, in its discretion, may arrange with the chief fiscal officer of said city for the collection by him of the tax imposed by this section with respect to items that enter into the tax base for both the tax imposed by said city and that imposed pursuant to this section, and for the remittance by him of the tax imposed by this section to the tax commission for disposition as in this article provided. If such an arrangement be made, all the provisions of the local law of said city imposing the local tax shall apply with respect to the tax imposed by this section in the same manner as if the local tax rate had included the tax imposed by this section.

14. The remedy provided by this section for review of a decision of the tax commission shall be the exclusive remedy available to any taxpayer to judicially determine the liability of such taxpayer for taxes under this section. Added L. 1937, c. 321, Sec. 1; amended L. 1938, cc. 67, 293, 384, 710; L. 1939, c. 936, Sec. 1; L. 1940, c. 131, Sec. 1; L. 1940, c. 494; L. 1941, c. 137, Sec. 2; L. 1942, c. 168, Sec. 1; L. 1942, c. 780; L. 1943, c. 120, Sec. 1, eff. March 16, 1943; L. 1943, c. 260, eff. April 3, 1943; L. 1943, c. 424, Sec. 1, eff. April 13, 1943.

No. 745

Supreme Court of the United States

CENTRAL GREYHOUND LINES, INC., OF NEW YORK,

Petitioner-Appellant,

—against—

CARROLL E. MEALEY, JOHN F. HENNESSEY and JOSEPH M. MESNIG, constituting the State Tax Commission of the State of New York,

Respondents-Appellees.

BRIEF BY PETITIONER-APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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BRIEF BY PETITIONER-APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Statement.

On November 9, 1946, the petitioner-appellant was served with the Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, dated November 8, 1946. Such Statement and Motion was made in opposition to the appeal taken by the petitioner-appellant as allowed by the Chief Judge of the Court of Appeals for the State of New York on October 21, 1946.

The petitioner-appellant has duly complied with all of the Rules of this Court and the record of this cause is now in the process of being transmitted to this Court by the Clerk of the Court below.

It is submitted that the Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, dated November 8, 1946, does not disclose any matter or ground making against the jurisdiction of this Court which has been previously asserted by the appellant. The said Statement, etc., does not set forth any grounds, as required by the rules of this Court, particularly Rule 7, Sub-paragraph 4, for the affirmance or dismissal of the appeal. It is manifest, as is demonstrated in the Jurisdictional Statement, Petition, and Assignment of Errors previously filed, that the appeal was and is taken on questions which are, indeed, substantial and require further argument, and a reversal.

The Proceedings in the Courts Below.

The appeal is taken from an order and judgment of the Court of Appeals of the State of New York embodied in its remittitur dated July 23, 1946, as amended October 15, 1946. The Court of Appeals affirmed an order of the Appellate Division of the Supreme Court, Third Judicial Department, which confirmed a final termination of the appellees. The cause arose as a proceeding under Article 78 of the New York Civil Practice Act brought to review the decision of the State Tax Commission.

The decision of the State Tax Commission involved the tax, as such, and as laid and assessed, under Section 186-a of the Tax Law of the State of New York which imposes a tax of 2% upon the "gross income" of corporations subject to the supervision of the Department of Public Service.

The appellant, Central Greyhound Lines, Inc., of New York, is an omnibus corporation subject to the supervision of the Department of Public Service. It carries passengers within and without the State of New York. The Company has paid the tax under 186-a upon revenue received from intrastate passengers. The State Tax Commission by the decision under review, as now appealed, has levied an additional tax against the Company based upon the revenue from passengers who travel through Pennsylvania and New Jersey on a journey which originates and terminates in New York State. This type of business is illustrated by passenger service from New York City to Syracuse, New York, where the busses travel via New Jersey and Pennsylvania.

The decision under review, and as now appealed, covers the tax for the month of July, 1937. For that month the revenue attributable to the mileage traversed within this State was 57.47% of the total revenue from the type of business under consideration. The period of July, 1937, was selected as a test period by agreement of the parties but the judicial result is to be applied to all the assessments "to date, for which application for revisions have been filed." (Folio 86 of the printed record on appeal in the Court of Appeals.)

The appellees decided that Section 186-a of the Tax Law applied to such bus transportation originating and terminating in this State and refused to pro-rate the revenue to the mileage traversed in this State.

The Appellate Division of the Supreme Court, Third Judicial Department, handed down a decision on November 10, 1943 (266 A. D. 848), and after discussing the question of the constitutionality of the statute, stated:

"In the light of the Federal decisions, we see no merit to the contention of petitioner that section 186-a of the Tax Law as above construed is a violation of the interstate commerce clause of the Federal Constitution. As stated above, this kind of transportation is not interstate commerce. * * *

"Finally, this is a tax against a certain corporation for the privilege of doing business in New York State. It is measured by its gross income. Consequently it is not a burden upon the particular business here sought to be exempted." (266 A. D. at 650.)

The Appellate Division thereafter refused leave to appeal to the Court of Appeals but the last mentioned Court upon a direct application for leave to appeal, granted leave to appeal.

After the submission of briefs and oral argument, the Court of Appeals rendered a decision on July 23, 1946 (296 N. Y. 18), in which it stated:

"There is no constitutional objection to taxation of the total receipts here. This is not interstate commerce (Cited Cases) * * *." (296 N. Y. at 25.)

On October 15, 1946, on motion of the petitioner, the Court of Appeals amended its remittitur by stating as follows:

"Remittitur amended by adding thereto the following: 'A question under the Federal Constitution was presented and passed upon by this Court, viz., whether Section 186-a of the Tax Law of the State of New York, as construed by the Tax Commission, is repugnant to the interstate commerce

provision of the Federal Constitution, Article I, Section 8. This court held that the aforesaid statute as so construed is not repugnant to that provision of the Federal Constitution.'"

Argument.

As appears above, there was drawn in question the validity of the statute, 186-a of the Tax Law, on the ground that it was repugnant to the Constitution of the United States and the decision of the Court of Appeals was in favor of its validity. It is submitted that the constitutionality of the statute was passed upon, and necessarily so, as is plain from the bare reading of the Court of Appeals opinion, together with the amended remittitur.

There was no waiver at any time on the record. In the brief filed by the petitioner-appellant in the Court of Appeals, reference was made to the constitutional question. In fact, the petitioner-appellant cited cases referred to in the opinion of the Court of Appeals, namely, *Lehigh Valley Railroad vs. Pennsylvania* (145 U. S. 192) and *United States Express Co. vs. Minnesota* (223 U. S. 335) and *Hanley v. Kansas City Southern Railway Co.* (187 U. S. 617) and quoted therefrom and stated that the commerce, concerned in such cases, was in fact interstate commerce and that the States had only limited powers in respect to it. The brief of the petitioner-appellant went on to say:

> "Regardless of any constitutional question that may be involved in the construction of the statute, we make the point that the legislature has used language in Section 186-a which limits the tax to the revenue from that portion of the utility service which is consumed here." (Pages 4 and 5 of appellant's Brief to the Court of Appeals.)

This Statement in Opposition to Jurisdiction and the Motion to Dismiss or Affirm press the argument, on page 4 thereof, that appellant's objection addressed to the unconstitutionality of the statute, as such, and as construed, and to the tax as laid and assessed, was waived. The said Statement cites *Galloway vs. Erie Railroad Co.*, 116 App. Div. 777, 780; Aff. on opinion below, 192 N. Y. 545). It is submitted that such case is not applicable on the facts here involved. That case concerned an intermediate appeal and does not stand for the broad proposition for which it was cited. (See *People vs. Journal Co.*, 213 N. Y. 1, 6) and (*Babba vs. Yonkers National Bank and Trust Co.* (265 A. D. 828, 830).

All questions were presented and preserved in the Courts below which are now the subject of Assignment of Errors in this Court.

As set forth in the papers on appeal herein, the issues raised in this case involve questions which are substantial. The Court of Appeals in the opinion below sought to distinguish the cases on which the appellant relied of *Lehigh Valley Ry. vs. Pennsylvania*, 145 U. S. 192; *United States Express Co. vs. Minnesota*, 223 U. S. 335; *State of Minnesota vs. United States Express Co.*, 114 Minn. 346; *Hanley vs. Kansas City So. Ry. Co.*, 187 U. S. 617. The net effect of the Court of Appeals opinion is that the Supreme Court cases, just cited, are not authorities for the appellant's position. It was, and is, the view of the appellant that in the Supreme Court cases just cited, the Supreme Court of the United States has clearly expressed at least a substantial doubt as to the power of a State to tax gross receipts from the transportation business of the character involved in the case at bar, so far as the tax

might have been applied to receipts from mileage without the State. Such was the interpretation the Supreme Court of the State of Minnesota placed upon the United States Supreme Court decision in the cases of *Lehigh Valley Ry. vs. Pennsylvania*, 145 U. S. 192, and *Hanley vs. Kansas City So. Ry. Co.*, 186 U. S. 617, for in the case of *State of Minnesota vs. United States Express Co.* (114 Minn. 346), the Court stated with respect to this identical problem:

> "We interpret the decision (The Lehigh Valley decision) as allowing a recovery of taxes upon that proportion of the earnings derived from the carriage wholly within the state. This seems to us the safer rule and avoids any question of taxing interstate commerce, and we adopt and apply it to this case."

The United States Supreme Court agreed with this decision of the Supreme Court of Minnesota and stated:

> "As to such shipments, the Supreme Court held that 9 per cent of the taxes claimed on this class of earnings should be deducted from the amount of the recovery allowed in the court of original jurisdiction, since it was disclosed that only 91 per cent of the mileage was within the state. For this part of the decision the Minnesota court relied upon Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 Led. 672. * * * An examination of that case shows that it is decisive of the present one on that point, and we need not further discuss this feature of the case." (223 U. S. 335.)

The case of *People ex rel. Cornell Steamboat Co. vs. Sohmer*, 235 U. S. 549, which involved a different taxing statute and upon which the Court of Appeals below relied is readily distinguishable, because in that case the taxpayer failed to

show, though the opportunity was afforded to it before the State Tax Commission, the portion of the revenue attributable to its towings outside of the State of New York. On the basis of the Lehigh Valley case (145 U. S. 192) such a showing was a prerequisite to the taxpayer's obtaining relief. In the case at bar, there is a specific finding by the New York State Tax Commission that the petitioner received from bus transportation originating and terminating in the State of New York but traversing without the State of New York for some portion of the journey, the sum of $84,412.31 (for the month of July, 1937, a month chosen as a basis for the decision—Folio 130 of the printed record on appeal in the Court of Appeals), and that 57.47 per cent of the total mileage of such journeys was traversed within the State of New York and 42.53 per cent of such total mileage was traversed without the State of New York (Folio 163, record on appeal in the Court of Appeals).

It is submitted, for the reasons previously stated, that there are no matters or grounds making against jurisdiction of this Court asserted by the appellant and that the questions on which the decision of the cause depends are substantial and that this cause should be heard on the merits, and the judgment below be reversed.

All of which is respectfully submitted,

Dated: Syracuse, New York, November 25, 1946.

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

NO. 745

CENTRAL GREYHOUND LINES, INC., OF NEW YORK,

Appellant,

—*vs.*—

CARROLL E. MEALEY, JOHN F. HENNESSEY and JOSEPH H. MESNIG, Constituting the State Tax Commission of the State of New York.

BRIEF FOR CENTRAL GREYHOUND LINES, INC., OF NEW YORK, APPELLANT.

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(a) INDEX.

Cases:

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BRIEF FOR CENTRAL GREYHOUND LINES, INC., OF NEW YORK, APPELLANT.

(b) Official Report of Opinions Below

This case is cited as Matter of Central Greyhound Lines, Inc., vs. Mealey, 266 App. Div. 648 (New York State Reports) and Central Greyhound Lines, Inc., of New York, Appellant, vs. Carroll E. Mealey, et al., constituting the State Tax Commission, Respondents 296 New York 18 (New York State Court of Appeals Opinion). Leave to appeal to the Court of Appeals by the Appellate Division,

Third Department, was denied, 267 App. Div. 841; but leave to appeal to the Court of Appeals by the Court of Appeals was granted, 292 New York, 723. The remittitur was amended by the Court of Appeals, 296 New York, 638. (Advance Sheets, Official Edition, No. 294, November 16, 1946.)

(c) Statement of the Grounds on Which the Jurisdiction of the Supreme Court of the United States is Invoked

The final judgment of the Court below was entered July 23, 1946 (R. 43), and amended October 15, 1946 (R. 50). The order allowing the appeal was filed October 21, 1946 (R. 60).

The jurisdiction of this Court is invoked under Sections 237 (a), (c) of the Judicial Code of the United States, as amended [Act of February 13, 1925, Chapter 229, 43 Stat. 931, as amended.] (Title 28 U. S. C. A., Section 344 (a), (c); and the Constitution of the United States, Article I, Section 8.

The STATEMENT AS TO JURISDICTION filed with this Court, in this case, referred to Section 237 (a) of the Judicial Code of the United States as sustaining the jurisdiction of this Court (Page 11 of such statement.) On December 23, 1946, this Court issued an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 63). If there be any doubt that this case should be heard by way of appeal in this Court, then appellant submits that it be taken by way of certiorari. (Wilson v. Cook, 327 U. S. 474, 482.)

A decision, a final judgment of the Court of Appeals, New York State, where there was drawn in question the validity of Section 186-a of the Tax Law [1] of that State on the ground of its being repugnant to the Constitution of the United States, (Article I, Section 8), was in favor of its validity.

(d) Statement of the Case [2]

I

THE PROCEEDINGS BEFORE THE NEW YORK STATE TAX COMMISSION AND THE FACTS

A. *The Filing of the Return with, the Petition to, and the Hearing before the New York State Tax Commission.*

(1) The Appellant, Central Greyhound Lines, Inc., of New York, hereinafter referred to as the "Taxpayer" or "Company", is a New York Corporation, engaged in business as a common carrier by omnibus (R. 3, 4). It oper-

[1] This law with its subsequent amendments is set forth in full in the Appendix "A" to this brief.

[2] The Appellant is mindful of the direction of this Court, in its Rule 27, that a "concise" statement shall be submitted. However, the Appellant has construed, it is hoped properly, this Court's Order (R. 63), postponing consideration of the question of its jurisdiction until the hearing on the merits, as an indication that the Court required of the parties further elaboration on the proceedings below. The facts and argument pertaining to the jurisdiction of this Court are set forth at this point.

ates its business both within and without New York State. (R. 4.)

On May 7, 1937, the New York Legislature enacted Section 186-a of the Tax Law.[3] In general terms, the statute required the Taxpayer to pay a tax of 2% on its receipts received in or by reason of any sale made or service rendered to persons for ultimate consumption or use by them in New York State. The first month for which the tax was imposed was July, 1937. On September 13, 1937 the Taxpayer filed a return for the month of July, 1937 with the New York State Tax Commission, the appellee, hereinafter referred to as the "Commission," under Section 186-a of the Tax Law (R. 8-13).

In its tax return, the Taxpayer claimed that revenue received from the sale of tickets for transportation from and to points originating and terminating in New York State but traversing outside the State was not taxable under Section 186-a since it was operating revenue earned in interstate commerce and outside the State of New York. (R. 10, 24.) This is the revenue over which the present controversy ensues in this Court.

The Taxpayer paid its tax on what it regarded as intrastate revenue in the amount of $1,472.45. (R. 9.)

In January, 1940, the Taxpayer, under protest, furnished the Commission with a statement showing its revenue originating and terminating in New York, but passing through Pennsylvania and/or New Jersey, enroute. (R. 13, 14.) In June, 1940, the Taxpayer was notified that it was liable for additional taxes in the amount of $1,688.24 (R. 15, 16) and it immediately filed its petition with the Com-

[3] See Appendix "A".

mission requesting a hearing and that the Commission cancel or reduce the illegal assessment. (R. 16, 17.)

(2) The petition of the Taxpayer alleged that these additional taxes were assessed upon its gross income from sales of transportation service "in interstate commerce originating and terminating within the State of New York, but consumed and used partly within the States of New Jersey and Pennsylvania." (R. 17.) The petition also alleged that the assessment was illegal and void in that "if any portion of said income is subject to taxation under Section 186-a of the Tax Law, the income for services consumed and used within the States of New Jersey and Pennsylvania must be eliminated therefrom and that the income from such services consumed and used without the State of New York constitutes over 50% of such income." (R. 17.)

(3) A hearing before the Commission was held October 20, 1942. (R. 18.) The issue before the Commission was whether Section 186-a applied to a tax on the sales of bus transportation from points originating and terminating in New York State, but traversing outside the State during some portion of the journey, and if the Section so applied, whether or not the receipts should be pro-rated according to the mileage in and out of New York State. (R. 18.)

At the time of the hearing, the disputed revenue involved then totaled $1,839,904.43 for 29 months from July, 1937 through November, 1939. (R. 15.) There was and is also involved the disputed revenue for each month thereafter and to date. The matter is still undecided until this Court makes its decision on the claims asserted by the Commis-

sion under Section 186-a of the Tax Law as amended, which is still in effect for the current operations in the year 1947.[4]

However, it was stipulated, at the hearing, that the proof would relate to operations for the month of July, 1937, but that the judicial result would be applied to all the assessments contested to date. (R. 18.)

The Commission found, as a fact that for the month of July, 1937, the Taxpayer received from bus transportation originating and terminating in New York State, but traversing without that State for some portion of the journey, the sum of $84,412.31, which amount the Taxpayer claimed was not taxable. (R. 34.) The Commission also found that 57.47% of the total mileage of such journeys was traversed within New York State and 42.53% of such total mileage was traversed outside of New York State (R. 34).[5]

B. *The Undisputed facts adduced before the Commission.*

[4] It will be noted that Section 186-a was amended by Laws of 1947, Chapter 89, Section 1, effective April 1, 1947, which made the tax permanent.

[5] Note that the Commission did *not* make a finding that this transportation was solely in fact "continuous." (R. 34.) The fact that a passenger may purchase a ticket for travel between two points in New York State does not mean that he engages in *continuous travel.* Exhibit 7 (R. 29-32) shows much of the travel was not continuous due to layovers, transfers and stop overs.

(1) Geographical Outline of New York State.[a]

The Commission was aware of the fact that the geographical outlines of the State of New York are quite irregular. New York City is the southern-most point of New York State and to its west there is no other territory within the State of New York. Not to labor the obvious, but because it is important in the issues of this case, the Taxpayer emphasizes the peculiar shape of the outlines of New York State. The shortest distance from cities such as Buffalo, New York, Rochester, New York, Syracuse, New York, to New York City necessarily includes the territory of the States of Pennsylvania and New Jersey. In effect, the direct route from any point in New York State to New York City, except from cities directly north of New York City, is the hypotenuse of a triangle and necessarily a portion of the distance on the hypotenuse is within the states of Pennsylvania and New Jersey.

(2) Routes of the Appellant

Many of the routes of the Taxpayer follow roughly a straight line from upstate cities of New York to New York City.

The Taxpayer has many routes which run from a point in New York State to another point in New York State by traversing New Jersey and Pennsylvania. Typical of this sort of route is that between Buffalo and New York City. That route runs from Buffalo to Batavia, New York, to Mount Morris, New York, Dansville, New York, Hornell, New York, Elmira, New York, then to Towanda, Pennsyl-

[a] A map of the territory concerned is included in the "Appendix" to this brief.

vania, then to Scranton, Pennsylvania, and through New Jersey to the Lincoln or Holland Tunnel and into New York City. (R. 24, 25.) Other routes of like nature, are from Binghamton, New York to New York City, which would traverse Pennsylvania and New Jersey. (R. 25.)

The routes "between places in the same State through another State" are included within the definition of "interstate commerce" under "Part II of the Interstate Commerce Act" (Title 49 U. S. C. A. Section 301, 303 (a), (10)) The Interstate Commerce Commission is granted the power to issue a Certificate of Convenience and Necessity (Part II of the Interstate Commerce Act, Title 49 U. S. C. A. Section 306 (a), (b)) [7]

(3) The Only Evidence of the Type of Revenues in Dispute

At the hearing, the Taxpayer introduced as evidence, an undisputed exhibit showing "Receipts from Interstate Business which Originates and Terminates in New York State, Month of July, 1937." (R. 29-32).[8] This exhibit showed for the month of July, 1937, all receipts on tickets which were purchased originally with a point of origin and

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[7] See Garrison v. Paramount Bus Corporation, 223 N. Y. App. Div. 75, 77; Pine Hill-Kingston Bus Corp. v. Davis, 225 N. Y. App. Div. 182, 183.

[8] The detailed analysis of the exhibit is required for the understanding of the type of interstate transportation involved and as a background for the distinguishing of cases, said by the Commission to support the validity of the Statute, as applied. See Point IV herein for the cases.

termination in New York State, but where a portion of the travel was through other states.

On the left-hand side of the page (e. g. R. 29) appears the name of a city as Buffalo. This indicates that tickets were purchased from Buffalo to New York City. The second column on this page designated "(1)" indicates the distance from Buffalo to New York City, to wit: 386.2 miles, and the third column on this page, designated "(2)" shows the mileage traversed between Buffalo and New York within New York State, to wit: 172.7 miles, so that it appears that on a run from Buffalo to New York City, 213.5 miles are traversed within Pennsylvania and New Jersey. Put another way, 44.72% of the actual distance of the route is within New York State and 55.28% is within the territory of Pennsylvania and New Jersey.

It will be observed that the fourth column of this exhibit breaks down the percentage of travel within New York State. The fifth column of the exhibit shows the total revenue obtained during the month for the run from the city named in the left-hand column to New York City. The last column on the exhibit, in dollars and cents, shows the amount of the revenue apportioned to New York State on the basis of the percentage of the mileage traversed within New York State to the total gross receipts for the entire route. This explanation of the exhibit appears in the testimony before the Commission (R. 21 and on the first thirteen lines of R. 22).

On the first page of this exhibit (R. 29) there are listed certain cities in the left-hand column which are located in the States of Pennsylvania and New Jersey, e. g., Port Allegany, Pennsylvania (which is the 17th city listed from the bottom of R. 29). This means that a ticket was sold

from or to New York City to another point in New York State, but a passenger boarded a bus on that ticket at Port Allegany.

Port Allegany, Pennsylvania is *also* listed on another page of the exhibit (R. 31—the 18th city listed from the top of that page). A passenger traveled from Port Allegany, Pennsylvania to East Aurora, New York. He took a New York-Cleveland, Ohio run from New York City on a ticket sold in two tears, one tear reading "from New York City to Port Allegany" and the other tear reading, "from Port Allegany to East Aurora." (East Aurora is in New York State) (See the explanation of this Port Allegany example in the testimony before the Commission at R. 22).

In further explanation of the exhibit, reference is made to R. 32, in the middle of the page, where three foot notes are keyed to certain Receipts. Foot note (a) refers to receipts which, by the nature of the composition of the exhibit, were not included in the preceding portion of the exhibit because of the difficulties of compilation in matching certain tickets with the final destination of the passenger where there had been a lay-over. (R. 26.) Foot note (a) however, reports the revenue received from a ticket purchased from a point within to a point within New York State but picked up by a bus driver on his trip which was scheduled to go into New York City. Typical of this situation would be a ticket purchased for a trip from Syracuse to New York City where a passenger decided to stop over in Binghamton, got off the bus at Binghamton and the bus driver drove on to New York City and made his report. (R. 26.) Whether that passenger ever used that portion of the ticket from Binghamton to New York City has not been determined. It will be noted that this revenue is, for convenience purposes, and without any concession as to the

propriety of the allocation, charged as revenue within New York State.

Foot note (b) reports receipts from a ticket purchased for a point within to a point within New York State, but picked up by a bus driver whose bus was not scheduled to run into New York City. Typical of this sort of situation is where a passenger buys a ticket from Watertown to New York City and transfers at Syracuse since the run stops there. This receipt, for the reasons previously stated, also is allocated to New York State.

Lastly, the (c) foot note refers to revenue from a ticket purchased from a point within to a point within New York State, but picked up by a bus driver on a run which starts outside of New York State. Typical of this situation is where one purchased a ticket from East Aurora to New York City, came to Port Allegany, Pennsylvania and there boarded a bus which took him to New York City. The revenue from that ticket is charged to interstate revenue outside of New York State. None of the revenue in these three foot notes is included in the revenue set opposite the names of specific cities. (R. 26, 27.)

It is obvious from this exhibit that there are innumerable stop-overs outside of New York State and in Pennsylvania and New Jersey. (R. 25.) Even though the ticket be purchased originally for a point within to a point within New York State, there are lay-overs and transfers. (R. 32.) If a passenger originated in Binghamton, New York, destined to New York City, he could decide when he got to Jersey City that due to sickness or any other reason, he wanted to stop off in Jersey City, in which instance the driver would punch his ticket and made a notation showing that he had ridden from Binghamton to Jersey City. (R. 25.) It follows that the passenger might well make this

stop over at Scranton, Pennsylvania or any other city in Pennsylvania or New Jersey. Two tear tickets might be used, for example, if a passenger knew when he left Binghamton, even though he eventually wanted to go to New York City, that he wanted to stop over in Jersey City. (R. 26.)

It is evident that the transportation of a passenger from a point within to a point within New York State traversing the territory of New Jersey and Pennsylvania involves considerable transportation outside of New York State. The composite mileage for the month of July, 1937, indicated that 42.53% of the total mileage was traversed outside of New York State. (R. 34.) The transportation of a passenger from a point within to a point within New York State also involves lay overs, stop overs and transfers in the territory of Pennsylvania and New Jersey. All of the activities that are implicit in the driving of a bus, the maintenance of stations, and arrangements for stop overs, lay overs and transfers are more than mere automaton-like.

C. *The Commission's Conclusions of Law.*

In the light of this evidence, the Commission found as conclusions of law that Section 186-a of the Tax Law applied to such bus transportation originating and terminating in this State and that the Section, so construed, violated neither the Federal or State Constitutions, and that the receipts from such transportation should not be prorated according to the mileage traversed in and out of this State.[9]

[9] Here, clearly, from the language of the Commission, it appears that the Taxpayer's challenge to the validity of the Statute, as applied, was considered and necessarily decided. (R. 34.)

II

THE PROCEEDINGS BEFORE THE APPELLATE DIVISION AND THE COURT OF APPEALS

(1) The Taxpayer immediately sought a review of the determination of the Tax Commission which was made January 27, 1943 (R. 33), and filed a petition under Article 78 of the Civil Practice Act of the State of New York. This petition, originally filed in the Supreme Court of New York, Albany County (which was thereupon transferred to a term of the Appellate Division for the Third Judicial Department (R. 3, 2)), alleged that additional taxes were assessed upon the gross income of the petitioner from sales of transportation services in interstate commerce (R. 4) and further alleged that the determination of the Commission was contrary to statute, unconstitutional, illegal and erroneous. The petition claimed that the assessment upon the income in dispute was illegal and void, was not authorized by statute and alleged further, that if any portion of the income was subject to tax under Section 186-a the income from services consumed and used within the States of New Jersey and Pennsylvania must be eliminated therefrom. (R. 4, 5.)

The Answer and Return of the Commission put in issue, by denial, the allegation that the transportation referred to, constituted interstate commerce. (R. 6.) The Commission's pleading also denied that the determination of the Commission was contrary to statute and was unconstitutional. (R. 6.)

The Appellate Division rendered its opinion for confirmation (266 App. Div. 648) (R. 38-40.)

Reserved for consideration under the ARGUMENT set forth in this brief are the various conclusions of the Appellate Division pertaining to the nature of the tax and its characterization of the transportation. Here, we emphasize the comment of that court with respect to the constitutional question involved. The court said:

> In the light of the federal decisions we see no merit to the contention of petitioner that Section 186-a of the Tax Law as above construed is a violation of the interstate commerce clause of the Federal Constitution." (R. 39, 40.)

That court set forth that the Taxpayer argued before it, that if the receipts from the sale of utility services for use partly within and partly without the state are taxable under Section 186-a when the journey originates and terminates in New York State:

> "* * * then the tax must be limited to the revenue attributable to the mileage in New York State, otherwise the statute is unconstitutional and a violation of the interstate commerce provision of the Federal Constitution." (R. 39.)

Lastly, the Appellate Division, in its reference to the question of the validity of the statute in the light of constitutional objections urged, stated that this was a tax for the privilege of doing business in New York State measured by gross income. Consequently, the Court concluded there was no "burden" upon the particular business here sought to be exempted. (R. 40.)

The Taxpayer applied to the Appellate Division for leave to appeal to the Court of Appeals and its application was denied (R. 41) (267 App. Div. 841) and thereafter petitioned the Court of Appeals for leave to appeal to that

Court and its motion was granted. (R. 36) (292 New York, 723.)

(2) After argument on the merits, the Court of Appeals handed down its decision (R. 44-50) and concluded:

> "There is no constitutional objection to taxation of the total receipts here. This is not interstate commerce. (Lehigh Valley Case, supra; People ex rel. Cornell Steamboat Co. v. Sohmer, 235 U. S. 549; Ewing v. Leavenworth, 226 U. S. 464.) * * *." (R. 49, 50.)

The Taxpayer moved to amend the remittitur and the remittitur was amended by the Court of Appeals to state the following:

> "A question under the Federal Constitution was presented and passed upon by this Court, viz. whether Section 186-a of the Tax Law of the State of New York, as construed by the Tax Commission. is repugnant to the interstate commerce provision of the Federal Constitution, Article I, Section 8. This Court held that the aforesaid statute as so construed is not repugnant to that provision of the Federal Constitution." (R. 50.)

In its brief, in the Court of Appeals, the Taxpayer made reference to the constitutional question and cited the very cases referred to in the opinion of the Court of Appeals and quoted therefrom, adding that the commerce concerned in the cited cases was in fact interstate commerce and that the States had only limited powers in respect to it. (Page 5 of the brief dated November 25, 1946, filed in this case, by petitioner-appellant in opposition to Motion to Dismiss or Affirm in the Supreme Court of the United States.)

The Court of Appeals construed the statute to permit the taxation of the revenue herein disputed. That Court stated that there was no constitutional objection to the taxation of those receipts. (R. 55).[10] Thus it necessarily passed upon the validity of the state statute which had been drawn in question on the ground that the statute was repugnant to the constitution.

The Court of Appeals decision was in favor of its validity, the appellant having launched its attack upon the validity of the statute as applied.[11] The language of the Appellate Division Opinion and the amended remittitur are proof that there was no waiver of this position. Reserved for consideration under the ARGUMENT set forth in this brief, are the various conclusions of the Court of Appeals pertaining to the nature of the tax, its characterization of the transportation. and the cases in the United States Supreme Court therein cited.

III

THE PROCEEDINGS BEFORE THE UNITED STATES SUPREME COURT, IN THIS CASE, ON THE PETITION FOR APPEAL

In accordance with the applicable statutes and the Rules of this Court, the appellant filed with the Chief Judge of

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[10] The opinion quoted the findings of the Commission that Section 186-a so construed violates neither the Federal nor State Constitutions. (R. 46.) (See also footnote 9.)

[11] See Memphis Natural Gas Co. vs. Beeler, 315 U. S. 649, 651.

the Court of Appeals of the State of New York, its petition for appeal (R. 52-57), obtained an order thereon (R. 60), filed its assignments of errors (R. 57-59) and its Statement as to Jurisdiction (see Statement as to Jurisdiction separately printed in this case). The Commission filed a Statement Opposing Jurisdiction and Motion to Dismiss or Affirm to which the Taxpayer filed its brief in opposition (see such brief separately printed). In accordance with Rule 12, as amended, of the Rules of this Court, the Taxpayer pointed out the grounds on which it contended that the questions involved were substantial. (See pages 6-9, Paragraphs 9-12 of Statement as to Jurisdiction filed in this case.)

The taxing statute involved herein has now been made permanent (Laws of 1947, Chapter 89, Section 1, effective April 1, 1947). Involved in effect, is the tax on the revenue disputed from June, 1937 to date (R. 18). Others engaged in the transportation of passengers across state lines will be affected by a decision in this case and the Taxpayer, in its own right, maintains a large volume of traffic between New York City and the central and western parts of the State of New York which passes through the States of New Jersey and Pennsylvania. (See Page 6, paragraph 9 of the Statement as to Jurisdiction.)

The questions involved are substantial, affecting the adjustment between burdens on interstate transportation and "gross receipts taxes" imposed by the state for revenue.

Not alone are the rights of the parties to this appeal involved, but the questions involved are substantial.

As this Court has indicated in Zucht v. King, 260 U. S. 174 (referred to in Paragraph 1 of Rule 12, as amended,

of this Court), if there is a substantial question as to the validity of the statute, it will hear the case on the constitutional question.

Taxpayer submits that there is no precedent in the decisions of this Court which can sustain the decision below and, in fact, the decisions of this Court require a reversal.

The cases cited by the Court of Appeals below to sustain its decision, (Lehigh Valley Railway v. Pennsylvania, 145 U. S. 192; United States Express Co. v. Minnesota, 223 U. S. 335; Hanley v. Kansas City So. Railway Co., 187 U. S. 617; State of Minnesota v. United States Express Co., 114 Minn. 346; People ex Rel. Cornell Steamboat Co. v. Sohmer, 235 U. S. 549; Ewing v. Leavenworth, 226 U. S. 464 (R. 48-50)) are distinguishable, as was indicated in the "Statement as to Jurisdiction" (Pages 7-9 and "Brief by Petitioner-Appellant in Opposition to Motion to Dismiss or Affirm" (Pages 5-8).[12]

The problem involved of state taxation by *gross receipts* of interstate transportation has long been recognized as involving substantial questions of law, to be resolved, in their constitutional aspect, by this Court. The question becomes of greater concern by the disposition of the states to impose such taxes with greater frequency in recent

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[12] These cases are discussed under Point IV of the ARGUMENT in this brief. It would be duplication to review these cases at this point, since, together with the "Gross Receipts Tax" cases, they constitute the argument on the merits.

years.[13] There is need for further precision regarding the scope of previous rulings on the power of the State to levy such gross receipts taxes.

(e) Specification of Assigned Errors Intended to be Urged

The Appellant specifies that the Commission erred in its determination, by its conclusions of law, and the Courts below erred in confirming and not reversing such determination, that,

> "Section 186-a of the Tax Law applies to such bus transportation originating and terminating in this State; that that such section, so construed, violates neither the Federal or State Constitutions, and that the receipts from such transportation should not be prorated according to the mileage traversed in and out of this State." (R. 34) (See Assignment of Errors at R. 57, 58, 59, Nos. 1, 11, 12 and 13).

The Appellant further specifies that the Courts below erred in holding that there was no constitutional objection to the taxation of the total receipts involved. (See Assignment of Errors, Nos. 2, 6, 13, R. 57, 58 and 59).

The Appellant further specifies that the Courts below erred in holding that Section 186-a of the Tax Law was valid, as applied, or construed, and did not violate the constitutional rights of the Appellant (See Assignment of

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[13] "State Gross Receipts Taxes," Dunham, 47 Columbia Law Review, 211, 226; "Gross Receipts Taxes on Transportation," Lockhart, 57 Harvard Law Review, 40, 42, footnote 11.

Errors, Nos. 3, 4 and 7, R. 57, 58). *Per contra*, the Courts below erred in not holding that the law, as construed, was repugnant to Article I, Section 8 of the Constitution of the United States. (See Assignment of Errors, No. 9, R. 58).

The Appellant further specifies that the Courts below erred in refusing to hold that the tax assessed and as laid was repugnant to the Constitution of the United States and, *per contra*, by holding that the tax laid was valid. (See Assignment of Errors, 10 and 4, R. 58, 59).

The Appellant further specifies that the Courts below erred in holding that the transportation involved is not consumed or used partly within or partly without the State of New York (See Assignment of Errors No. 5, R. 58), and thus was not "interstate commerce."

(f) ARGUMENT

Summary.

The transportation here involved is "interstate commerce." Passengers purchase tickets with stated terminii in New York State, but are carried into, from (on stop overs, lay overs, and transfers) and through Pennsylvania and New Jersey. Such travel is "commerce."

The Statute, as construed, would tax directly gross receipts on such commerce under the guise of a privilege tax for doing business in New York. The Statute, as applied, is unconstitutional, because it is not a privilege tax for doing a local business, or on a local event, as appears from the language of the Statute, and because it is unapportioned and imposes not alone the risk, but the fact, of cumulative burdens on interstate commerce.

If such Statute be deemed not wholly invalid, then the receipts for the portion of the travel outside of the State of New York may not be taxed. The taxation of receipts for travel only within New York State would mitigate the multiple burdens involved.

The cases cited by the Courts below are distinguishable and emphasize the need for apportionment.

Because this case involves substantial issues concerning the accommodation between the needs of a State for revenue (by imposing a gross recipts tax) and the needs of the Nation for freedom from direct interference with interstate commerce, this Court should take jurisdiction and determine the question by reversing the Court below.

I.

The transportation here involved is interstate commerce.

Early this Court said that "a tax upon fares • • • received for transportation is virtually a tax upon the transportation itself" (Philadelphia & S. M. S. S. Co. vs. Commonwealth of Pennsylvania, 122 U. S. 326 at 340). The transportation here was "interstate commerce."

From a factual standpoint, it cannot be denied that the activity of transportation, by common carrier, of persons, across state lines, into other states, is interstate business. The fact that the transportation, by route of travel, is such that both the point of origin and termination are within a single state, where a portion of the route is travelled outside the single state, makes it no less "interstate commerce" (Hanley vs. Kansas City Southern R. Co., 187 U. S. 617; Western Union Telegraph Co. vs. Speight, 254 U. S. 17; Garrison vs. Paramount Bus Corp., 223 N. Y. App. Div. 75, 77; Pine Hill-Kingston Bus Corp. vs. Davis, 225 N. Y. App. Div. 182).

In the case at bar tickets are sold in accordance with tariffs published and filed with the New York State Public Service Commission (R. 19). Passengers purchased tickets for travel from a point within to a point within New York State, but a portion of the travel was in New York and New Jersey (R. 21). Some passengers boarded buses in Buffalo, New York, for example, and remained on the bus while travelling through the states of Pennsylvania and New Jersey to the point of destination, New York City (R. 20). Other passengers, having purchased a ticket for transportation from Binghamton, New York to New York City,

boarded the bus at Binghamton but got off at Jersey City, New Jersey (R. 25). Later, perhaps the next day, that same passenger boarded another bus in Jersey City and rode into New York City (R. 25, 26). Other passengers bought tickets for transportation from other cities in Upstate New York to New York City, but stopped over in Pennsylvania and New Jersey and later boarded buses in Pennsylvania and New Jersey for transportation into New York City (R. 29-32).

The transportation of passengers, in this case, is not solely the conducting of a "continuous"[11] travel on a single trip from a point within to a point within New York State, traversing a portion of other states.

Tickets contain stopover privileges (R. 25). Passengers lay over (R. 32), and they transfer or change buses in Pennsylvania and New Jersey (R. 22). The bus, ridden by those who purchased these tickets, the revenue for which is here in issue, travels the highways of Pennsylvania and New Jersey for 42.53% of the entire journeys.

The Court will recognize that bus lines do not operate without terminal facilities. The activities of the Taxpayer in Pennsylvania and New Jersey in furnishing such facili-

[11] See the factual distinction concerning "continuous carriage" and that there was no "breaking of bulk or transfer of passengers in New Jersey," made by the Court in Lehigh Valley R. Co. vs. Pa., 145 U. S. 192; see N. Y. ex rel Cornell Steamboat Co. vs. Solmer, 235 U. S. 549, where the decision is barren of any reference of any out of state activity except the attaching of a tow line and plying the waters of a navigable river. These cases are analyzed at Point IV of the ARGUMENT herein.

ties to passengers from New York State as a part of the price of the tickets here involved are, in themselves, substantial proof that the Taxpayer is engaged in a wealth of interstate activity, interstate commerce.

There is no claim here, and there could be none, by the Commission that the routes traversed outside of New York were unreasonable or a subterfuge for the purpose of taking advantage of Federal rights. The routes here followed were subject to the approval of the Interstate Commerce Commission (Part II Interstate Commerce Act; Title 49 U. S. C. A., Section 306).

Routes which traverse the territory of another state, though the termini are within still another state, are expressly covered within the definition of "interstate commerce" under the last-cited statute (see Title 49 U. S. C. A. Section 303(10)).

These out-of-state routes were not taken with the "obvious direct intrastate" routes open.[15] The direct route was and is the out-of-state route, and the journey in Pennsylvania and New Jersey is no "detour." [16]

Here, then, factually, and as a matter of law, was "interstate commerce." [17]

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[15] See Wooleyhan Transport Co. vs. George Rutledge Co., U. S. C. C. A. 3rd, decided July 14, 1947, official report unavailable.

[16] See that reference in Lehigh Valley R. Co. vs. Pennsylvania, 145 U. S. 192.

[17] Lest there be any misunderstanding, it is noted that the issues in this case do not involve the validity of state taxes and regulations other than a gross income (receipts) tax as here imposed.

II.

The statute, as applied and construed, imposes an unconstitutional, direct, unapportioned gross receipts tax on interstate transportation, commerce.

It having been established that the tax on the revenue of transportation was a tax on the transportation itself, which constituted "interstate commerce," (Point I) the Taxpayer now demonstrates that the State was without power to impose such a tax.

It has long been settled that a direct, unapportioned tax on gross receipts from interstate commerce is beyond the state taxing power. The reasons underlying this rule have been stated, and each reason assigned in the cases to be cited applies to the case at bar. It must be remembered in this case the activity in which the Taxpayer is engaged is interstate commerce, i. e., the receipts here sought to be taxed directly are from interstate transportation.

A. *The Tax, as Construed, is not on a "local activity," but is a Direct Tax on the Gross Receipts of Interstate Commerce.*

The tax imposed here is "direct." It is a tax on that part of the revenues of journies, e. g., from Buffalo to New York, which is derived from furnishing transportation through Pennsylvania and New Jersey.

The tax cannot be disguised [18] or camouflaged by calling

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[18] Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227.

it an "indirect" tax on interstate commerce or by the use of magic words that it is a tax for the privilege of doing business in New York.[19] The Appellate Division below stated that there was no burden here because it was a tax on that privilege for doing business in New York (R. 40). Nevertheless, if words are to correspond with things,[20] the tax here is upon the *gross receipts* of revenue from travel *outside* of the State of New York.

It is a direct contradiction to say that the tax is on the privilege of doing business in New York when in fact the revenue sought to be taxed and justified on that theory, is for the doing of business in Pennsylvania and New Jersey. The so-called "taxable event" is not the doing of business, or engaging in an occupation which by its *very nature* is limited to the territorial confines of the State of New York. (Gwin, White and Prince v. Henneford, 305 U. S. 434.) The business of transportation or the occupation of engaging in it, is one which involves, where the routes go outside of the state, transportation outside of the state.

The tax in this case is not one for the use of highways (See Dixie Ohio Express Co. v. State Revenue Commission, 306 U. S. 72). The statute here states that it is applicable regardless of "whether use is made of the public streets" (See Subdivision 2 of the statute in Appendix "A"). In passing, it is noted that where the tax is said to be laid for

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[19] A tax may not be misdescribed to render valid one which is invalid. McLeod v. J. E. Dilworth Co., 322 U. S. 227, 331.

[20] Freeman v. Hewitt, 329 U. S. at 258.

the use of the highways, it may not be disproportionate to the local activity. (McCarroll v. Dixie Greyhound Lines, 309 U. S. 176).

The statute here is not a tax imposed "in lieu" of all other taxes, for its language states that it shall be "in addition to any and all other taxes and fees imposed by any other provision of law." (See Subdivision 1 of the statute in Appendix "A," and see comparable language in Meyer v. Wells Fargo Co., 223 U. S. 298, 299; McHenry v. Alford, 168 U. S. 651.)

It becomes important to determine the subject of the tax in order to perceive clearly the lines of authority which this Court has laid down in gross receipts tax cases,[21] for certainly emphasis has been placed, by this Court, upon the subject of the tax as well as upon its nature or admeasurement.

The determination by the Courts below that the tax was of a nature of one imposed for the "privilege of doing business" (R. 40), is not binding upon this Court (United States Express Co. vs. Minnesota, 223 U. S. 336; Galveston H. & S. A. R. Co. vs. Texas, 210 U. S. 217; New Jersey Bell Telephone Co. vs. State Bd. of Taxation and A. of N. J., 280 U. S. 338, 346, 347.)

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[21] "Gross Receipts Tax on Transportation," Lockhart, 57 Harvard Law Review 40; "More Ado about Gross Receipts Taxes," Powell, 60 Harvard Law Review 501; Western Livestock v. Bureau of Revenue, 303 U. S. 250, 256; Joseph vs. Carter & Weeks Stevedoring Co., 330 U. S. 422; Freeman vs. Hewitt, 329 U. S. 249.

The statute, in the case at bar, does not say that the tax is imposed for the privilege of doing business. The statute is captioned "Emergency Tax on the Furnishing of Utility Services."[22] The words "doing business" appear in the statute only with reference to a description of the "utility" upon which the tax is imposed.[23] Apparently only "utilities" which includes "persons,"[24] doing business in New York State are subject to the tax, but that is not to say that the tax is imposed for the *privilege* of doing business.

The statute is not designed as a privilege tax because, on its face, it qualifies the services rendered, and upon which the tax is imposed, by stating "regardless of whether such activities are the main business of such person or are only incidental thereto."[25] True, what may be "incidental" to a main business and may in and of itself be a substantial business but that the legislature had no such thought in mind is indicated in the legislative intent which states that the tax was imposed on whether such services were the main or *incidental part of their business.* (See "INTENT" Appendix "B" herein.) Therefore it

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[22] The word "emergency" has now been eliminated by the Laws of 1947, Chapter 89, Section 1.

[23] See Subdivision 1 of the statute in Appendix "A" herein.

[24] See Subdivision 2(b) of the statute in Appendix "A" herein.

[25] See Subdivision 2(a) of the statute in Appendix "A" herein.

seems far-fetched to conclude that this is a tax on the privilege of doing business, when the activities upon which the tax is imposed need be only "incidental."

The tax was originally an emergency tax to aid in financing the extraordinary cost of relief.[26] Apparently, in the search for revenue, the Legislature seized upon the business of "utilities." But strangely silent is the statute on any recital or statement that the *quid pro quo* for the imposition of the tax was the privilege of furnishing the services.

It is concluded that by the very terms of the statute, it is not a tax on the privilege of doing business, i. e., furnishing utility services.

This Court pursued a line of inquiry in another case (Adams Mfg. Co. v. Storen, 304 U. S. 307, 310) in examining the *subject* of the tax, which is helpful, in the process of exclusions, in determining the *subject* of the tax of the case at bar.

(1) The tax in the case at bar is not an excise tax for the privilege of domicile, since it is levied upon the gross income of non-residents as well (see Appendix "A", of this brief).

(2) It is not for the transaction of business since in many instances it hits the receipts of income by one who only conducts an activity which is "incidental" to his business.

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[26] See Appendix "B" of this brief for the "Legislative Intent."

(3) It is not a charter fee and this is so because charter fees of the taxpayer are paid under the Franchise Tax Law (Section 184 of the New York Tax Law).

(4) It is not an excise upon the privilege of doing business since, as stated above, the statute does not say so, and even if it did the state may not impose a tax on the privilege or occupation of engaging in interstate commerce (Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Pickard v. Pullman So. Car Co., 117 U. S. 34; Robbins v. Shelby, County Taxing District, 120 U. S. 489; Fargo v. Michigan, 121 U. S. 230; Cooney v. Mountain States Tel. & Tel. Co., 294 U. S. 384; Fisher's Blend Station v. State Tax Commission, 297 U. S. 650; General Trading Co. v. State Tax Commission of Iowa, 322 U. S. 335).

(5) It is not a tax in lieu of *ad valorem* taxes for, as stated above, the statute does not forgive or reduce all other state taxes paid by the taxpayer, nor does it seek to impose a property tax (cf: United States Express Co. v. Minnesota, 223 U. S. 335; Cudahy Packing Co. v. Minnesota, 246 U. S. 450; Pullman Co. v. Richardson, 261 U. S. 330; Illinois Central R. R. v. Minnesota, 309 U. S. 157).

In summary, it is concluded that this tax is *a privilege tax upon the receipt of gross income* just as the Court concluded was the tax in the *Adams* case, 304 U S. at 311. (See also Department of Treasury v. Wood Preserving Corp., 313 U. S. 62, 66.)

As a tax based on the privilege of receiving gross income —a tax upon gross receipts from commerce, being unapportioned, it must fall.

The tax is upon the business of interstate transportation which is unlike the business of manufacturing where the total activities of the process of manufacturing are carried on within a single state. (See American Manufacturing Co. vs. City of St. Louis, 250 U. S. 459, which has been explained in J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 312, 313, also in Gwin, White and Prince v. Henneford, 305 U. S. 434, 440, and in Freeman v. Hewitt, 329 U. S. at 258. Neither is the business of engaging in transportation across state lines akin to the business of preparing, printing, and publishing magazine advertising, which is peculiarly local. (Western Livestock v. Bureau of Revenue, 303 U. S. 250, 258.) In that case, it is noted, that while the tax was sustained on the "peculiarly local" activities of the company, which were the subject for the tax, a gross receipts tax on subscriptions of the magazine was not in issue, and had such been the case the result might well have been different. (See Department of Treasury v. Ingram Richardson Mfg. Co., 313 U. S. 252, 255.)

The appellee Commission can take no comfort in the more recent decisions of this Court which sustained a sales tax of New York City (McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33). The tax was sustained because it was conditioned upon a local activity which was the delivery of goods within the state, and the force of decisions, such as the *Adams* case, prior to the New York City sales tax case, has not been "sapped" by such decision. (Freeman v. Hewitt, 329 U. S. at 257.) The "use" tax cases are limited by their very nature. They are levied on "intrastate use after the completion of an interstate sale." (International Harvester Co. v. Department of Treasury, 322 U. S. 340, 347; Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62, 67; Southern Pacific Co. v. Gallagher, 306 U. S. 167.)

It has been said that the line of demarcation, of unapportioned gross receipts taxes sustained and those not sustained, appears to rest upon whether the subject of the tax is identified with intrastate commerce or interstate commerce.[27] Here there is no trouble in identifying the subject taxed as interstate commerce, i. e., the transportation of persons across state lines. The tax is one directly on it, not on a local event.

B. *Since the Tax, as Construed, is a Direct Tax on Interstate Commerce and Since it is Unapportioned, it Must Fall.*

Gross receipts taxes on commerce (interstate transportation), unapportioned and not imposed in lieu of other taxes, or fairly upon a local taxable activity, are invalid. (Philadelphia and So. S. S. Co. v. Commonwealth of Pennsylvania, 122 U. S. 326; Ratterman v. Western Union Telegraph Co., 127 U. S. 411; Case of State Freight Tax, 15 Wall. 232; Fargo v. Michigan, 121 U. S. 230; Galveston H. & S. A. Ry. v. Texas, 210 U. S. 217; Meyer v. Wells Fargo, 223 U. S. 298; Western Union Telegraph Co. v. Kansas ex. rel. Coleman, 216 U. S. 1; New Jersey Bell Tel. Co. v. State Bd of Taxes and A. of New Jersey, 280 U. S. 338; Fisher's Blend Station v. State Tax Commission, 297 U. S.

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[27] See "State Taxation and the Commerce Clause." Traynor, 28 California Law Review, 168, 175.

650; Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90).[28]

Here in the case at bar, no pretense is made of apportionment. The statute makes no reference to apportionment and the State Tax Commission below refused to apportion (R. 34), although a basis for apportionment by actual break-down of routes traveled, was furnished by the Taxpayer. The tax here, as construed, since it is unapportioned, must fall in view of the authorities just listed.

C. *Since the Tax as Construed Places on Commerce the Risk and Fact of Cumulative Multiple Burdens, it Must Fall.*

The reason for the announced rule of this Court for condemning such unapportioned taxes has been said to obviate multiple or double taxation.[29] In the *Western Livestock*

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[28] The following cases sustained a gross receipts tax and are here cited with parenthetic comment to indicate their inapplicability: U. S. Express Co. v. Minnesota, 223 U. S. 335 (in lieu of other taxes); Cudahy Packing Co. v. Minnesota, 246 U. S. 450 (in lieu of other taxes); Coverdale v. Arkansas-Louisiana Pipe Line, 303 U. S. 604 (privilege of producing power—local); Ford Motor Co. v. Beauchamp, 308 U. S. 331 (apportioned); Department of Treasury v. Wood Preserving Corp., 313 U. S. 62 (local sale, no case for apportionment); Maine v. Grand Trunk Ry. 142 U.S. 217 (apportioned); See the comment on the "use" and "sales" tax under par. A of this Point.

[29] "State Tax Barriers to Interstate Trade," Lockhart, 53 Harvard Law Review, 1253, 1261.

case, 303 U. S. 250, at 260, this Court indicated that by sustaining the tax in that case, a further tax upon the same event cannot be imposed elsewhere. The Court then had in mind taxes laid upon gross receipts derived from interstate transportation because it agreed with the "objection" which has been leveled at such taxes in transportation cases, the danger of *multiple taxation*.

The fears of multiple taxation which may serve as a basis for striking down taxes on transportation companies are more than fanciful in the case at bar. Here there is not alone the threat, but the fact, of imposition by another state on the very revenue taxed here.[30] *Pennsylvania imposes a gross receipts tax upon taxpayers such as the appellant* in the case at bar and measures such gross receipts by the fraction of the number of miles traveled in the State of Pennsylvania over the total number of miles of the carrier times the interstate receipts of the carrier.[31] (See in Appendix "C" to this brief, a portion of the Pennsylvania statutes.) Translated into the facts of this case, if the New York State tax were sustained, the Taxpayer would be taxed doubly on the same revenue and travel. For example, if New York may tax the revenue derived for travel within Pennsylvania and New Jersey on a ticket bought for terminii points between Buffalo and New

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[30] "The bridge has been crossed," a journey not taken in International Harvester Co. v. Department of Treasury, 322 U. S. 340 at 348.

[31] See for the proper "numerator," International Harvester Co. v. Evatt, 329 U. S. 416.

York, then Pennsylvania also taxes that revenue. It appears that Pennsylvania includes the mileage within Pennsylvania in the numerator of a fraction and the total gross receipt of the run from Buffalo to New York is multiplied by the fraction to determine the apportioned tax.

See appendix "C" to this brief where pertinent provisions of Pennsylvania Franchise statutes are printed and it will be noted that its method of calculation includes a fractional device, which, if the tax here be sustained, might well be modified.

The fact of multiple taxation, in this case is sufficient, it is submitted, to condemn the act of New York State under the reasons advanced by the majority of this Court in its opinions (see cases cited in Gwin, White & Prince v. Henneford, 305 U. S. 434, 439), or by reason of the decisions in the concurring or dissenting opinions. If this be a direct, unapportioned tax on gross receipts, then the inquiry into actual multiple burdens may be unnecessary. (See Freeman v. Hewitt, 329 U. S. at 256). Since it is an unapportioned tax, it must be condemned. (Freeman v. Hewitt, 329 U. S. at 259.) Since it is a "tax on interstate transportation" and "an exaction on property in its interstate journey," it must be condemned (329 U. S. at 286).

Since the transportation here is, of itself, interstate commerce, it must be condemned even if the threat of a multiple burden is absent (Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 422). Neither the *activities* nor the *gross receipts* of the Taxpayer are here apportioned, and stripping this case of "matters of form" the tax threatens harm to interstate commerce and will harm and does harm interstate commerce because of the multiple

burdens imposed and must thus be condemned. (Joseph v. Carter & Weeks Stevedoring Co., 330 U. S. at 443).

Thus, this is not a case which concerns only the state of origin of travel. It concerns the power of other States to make like exactions. (This was not a consideration in the *Lehigh Valley* case, 145 U. S. 192, where the tax was apportioned.)

It is no answer to say that local commerce is subjected to this same gross receipts tax (Freeman v. Hewitt, 329 U. S. at 254). Given, a non-discriminatory tax, (as to products or transportation limited to the confines of a single state) such explanation may have merit. But involved here are the powers of the other 46 states to make the same imposition, unless the taxpayer is to be protected by the Commerce Clause. Here, the taxpayer need not wait for the legislature of Pennsylvania to act. The tax has been imposed. That the other 46 states may or may not act (and many have) is beside the point. If the tax is sustained then the *power* of all other states to tax the same revenue for the event of doing this business is established.

It is said that any increase in cost because of the tax, is not the basis for determining invalidity (Freeman v. Hewitt, 329 U. S. 256), but what is important is the deterrent effect of the tax sought to be sustained, and that is not precisely calculable until this Court decides the issue. It is enough to say that a double tax on the revenue may deter this sort of travel to the inconvenience and detriment of the taxpayer, and the traveling public for which it furnishes these services, as well as to other carriers in like position and the public they serve.

In summary, since the tax (a) is not on the subject of a "local" activity, viz: a privilege to do a "local" business, or on a franchise to conduct business as a corporation, or to use highways, or in lieu of a property tax, and (b) is unapportioned as to gross receipts and activities, with cumulative burdens not alone a risk, but a fact, it must be condemned.

III.

If the tax, as construed, be deemed not wholly invalid, the gross receipts from transportation outside of New York State may not be taxed.

The power of a state to tax, together with the limitations upon that power imposed by the Commerce Clause, has been the focal point of judicial determinations since the inception of our Government. In the adjustment to satisfy the needs for state revenue without impignment upon interstate commerce, delicate lines have been drawn.

While it has been said that "even interstate business must pay its way" (Western Livestock v. Bureau of Revenue, 303 U. S. 250, 254, quoting Postal Telegraph Cable Co. v. Richmond, 249 U. S. 252, 259), that language is used in the setting that those engaged in such commerce are not to be relieved from their just share of the state tax burden. Quickly this Court added, that local taxes measured by gross receipts from interstate commerce have often been pronounced unconstitutional (Western Livestock v. Bureau of Revenue, 303 U. S. 255).

The selection of a choice between the need for local revenue and protection of interstate commerce may, in the

case at bar, be regarded as unnecessary in the light of Ratterman v. Western Union Telegraph Co., 127 U. S. 411. That case recognizes that a single tax assessed under a state law upon the receipts of a telegraph company which were derived partly from interstate and partly from intrastate commerce, may be regarded as invalid only in proportion to the extent that such receipts were derived from interstate commerce. (See comments in Western Union Tel. Co. v. Steay, 132 U. S. 472.)

In the *Ratterman* case, the telegraph company was engaged in the transmission of messages between points in and outside the State of Ohio and between points within the State of Ohio. The Court found that the gross receipts from both types of transmission were factually separable and the Court adjudged invalid the collection of any receipts other than those derived from commerce entirely within the limits of the State of Ohio.

The claims of the appellant taxpayer in the case at bar were originally formed in the alternative below. Before the Commission, the issue was stated to the effect that if the tax was determined applicable the question arose as to "whether or not the receipts should be pro rated according to the mileage in and out of the State." (R. 18.) The evidence adduced by the Taxpayer showed a break-down of the revenue prorated (R. 29-32). The Commission in its conclusions of law held that there should be no proration (R. 34).

Before the Appellate Division, the Taxpayer argued, in the alternative, as that Court stated (R. 39), and before the Court of Appeals, the argument of the Taxpayer was that

> "* * * if the statute is construed to tax this kind of business it should be construed to tax only that proportion of its receipts attributable to mileage within this State." (R. 48.)

Without conceding that the entire revenue is taxable, it is urged that the exclusion of the revenue for the mileage traversed outside of New York State would mitigate the multiple or double taxation here involved. If the State of New York be confined to its taxes based upon the activities of the Taxpayer within its state, then so too may Pennsylvania be thus confined, and New Jersey likewise, with the sole effect upon the Taxpayer of paying taxes based upon truly apportioned methods. By such apportionment, the Taxpayer will pay a share of the cost of local government whose protection it enjoys. Again by stating the position of the taxpayer in the alternative, it should not be assumed that it regards itself as having paid less than its fair share for support of local government. Witness the other taxes imposed upon it.

With the fundamental rule firmly fixed that an unapportioned receipts tax on transportation is invalid, certainly an apportioned tax would seem to meet the economic, as well as the formal, lines drawn by this Court in its previous decisions.[32]

It is urged therefore that the revenue for the mileage traversed outside of New York State, 42.53% of the total mileage, be regarded as excluded from the base upon which the tax may be laid for the revenue here in dispute.

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[32] See the cases cited under Point II, B and footnote 28 herein.

IV.

The cases cited below require a reversal.

The Court below relied upon five cases to support its holding of validity. They are discussed seriatim.

(1) In Lehigh Valley Ry. Co. vs. Pennsylvania, 145 U. S. 192, the railroad transported passengers, but mostly freight, from Mauch Chunk, Pennsylvania to Philadelphia, Pennsylvania by a *continuous run* from Mauch Chunk to Phillipsburg, New Jersey, and from the latter city through New Jersey to Philadelphia, Pennsylvania. *There was no breaking of bulk or transfer of passengers in New Jersey* (145 U. S. at 201). Pennsylvania did not seek to tax the gross receipts for the freight or the passenger travel from Mauch Chunk to Philadelphia. Only that portion of the revenue attributable to the miles actually run in Pennsylvania (that is, from Mauch Chunk to Phillipsburg, New Jersey) was regarded as taxable. The case is therefore one where an *apportioned* tax was sustained.

It is clear from the facts in that case that, unlike the case at bar, passengers were not transferred in New Jersey. The extent of the activity of the railroad in New Jersey was, hence, considerably limited and may be regarded as minimal. In fact, it is significant that the Lehigh Valley Railroad had the alternative of using two routes from Mauch Chunk to Philadelphia—one by way of the Philadelphia and Reading road, being wholly within the State of Pennsylvania, and the other by its own line connecting with the lines of the Pennsylvania Railroad at Phillipsburg, New Jersey (145 U. S. at 199). The reasons why the Lehigh Valley Railroad chose to send a portion of its travel

through the out-of-state route do not appear in the decision, but the fact that it had a choice to use an indirect as well as a direct route is significant. In the case at bar, the direct route was used, and passengers serviced along the entire line. In the Lehigh Valley case, there is no reference whatsoever to passengers boarding the train or their being taken on at intermittent points on the direct route.

The limited nature of the holding in the Lehigh Valley case, as here interpreted, was approved by this Court in a subsequent case.

(2) In Hanley vs. Kansas City So. Ry. Co., 187 U. S. 617, the State of Arkansas asserted the right to fix rates for continuous transportation between two points in that state when a large part of the route was outside the state. The court stated that to say that this travel was confined to Arkansas would be a fiction, 187 U. S. at 620, (just as it would be fictional to claim that the transportation in the case at bar was confined to the State of New York). In preventing the State of Arkansas from fixing the rate, the Court made reference to the Lehigh Valley case (145 U. S. 192), characterizing it as one where "the tax 'was determined in respect to the receipts for the proportion of the transportation within the State'." (187 U. S. at 621).

Again, in the Hanley case, the traffic was continuous and the Court reiterates the rule, in effect, that an unapportioned tax on the gross revenue of a route which traverses outside of a state in which the termini are located, is invalid.

(3) In United States Express Co. vs. Minnesota, 223 U. S. 335, a tax was imposed upon the gross receipts of the express company for business done in the state. Under

the stipulated facts, the earnings, in part, consisted of earnings on express business of shipments delivered by the shipper to the express company in the State of Minnesota, consigned to an ultimate consignee at a second point in the State of Minnesota, which shipments were forwarded between the point of origin and point of destination over lines of a railroad which were partly within and partly without the State of Minnesota. The earnings *sought* to be taxed by the state were based upon the total earnings of those shipments and not that part of the earnings apportionable to the transportation which was performed within the State of Minnesota. It appeared that 91% of the mileage of such shipments was within Minnesota.

This Court, with reference to the facts just recited, said:

> "As to such shipments, the supreme court held that 9 per cent of the taxes claimed on this class of earnings should be deducted from the amount of the recovery allowed in the court of original jurisdiction, since it was disclosed that only 91 per cent of the mileage was within the state. For this part of the decision the Minnesota court relied upon Lehigh Valley R. Co. vs. Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 1 Inters. Com. Rep. Sec. 7, 12 Sup. Ct. Rep. 806. An examination of that case shows that it is decisive of the present one on this point, and we need not further discuss this feature of the case." (223 U. S. at 342.)

This Court had before it the decision of the Supreme Court of Minnesota, which stated:

> "It perhaps does not appear as clearly as it might whether the recovery in that case (Lehigh Valley) was allowed for the entire earnings, or for a pro-

portion thereof based upon the mileage within the state; but we interpret the decision as allowing a recovery of taxes upon that proportion of the earnings derived from the carriage wholly within the state. This seems to us the safer rule and avoids any question of taxing interstate commerce and we adopt it and apply it to this case." (114 Minn. 346; 131 N. W. at 490.)

Again, an *apportioned* tax on the gross revenue of a route which traverses outside of a state in which the termini are located was valid, and the portion of the tax was sustained on the basis that it was "in lieu of all taxes" on the property. (223 U. S. 335, 336.)

The Court of Appeals, in discussing these three cases, *Lehigh Valley, United States Express Co.* and *Hanley,* sought to limit the holdings other than as indicated. The Court stated that no case had been cited where the United States Supreme Court had held that a tax on this type of transportation "must be limited" to receipts for mileage covered within the state of origin and terminus. (R. 48.) [33] It is respectfully submitted that the very language of this Court in the Express Company case, (223 U. S. 334 at 342) which states that the Lehigh Valley case is "decisive" of the present question, indicates that there is an express holding that the receipts "must be so limited." This con-

[33] The ninth line from the bottom on Page 48 of the Record contains a typographical error by the transposition of the letters "n" and "o". The ninth line from the bottom of R. 48 should read: "be noted here that the petitioner cites no case where the * * *.

clusion is reinforced by the fact that the Supreme Court of Minnesota had decided that the apportionment was required, relying upon the Lehigh Valley case, and this Court held it was decisive. The Court of Appeals sought to distinguish the *Hanley* case on the ground that it was a regulatory rather than a taxation question, yet the language in the *Hanley* case specifically interpreted the *Lehigh Valley* case as a proportioned tax case.

Reliance of the Court of Appeals upon the *Lehigh Valley* case should lead properly to reversal of the decision below.

The Court of Appeals cited two other cases in support of its conclusion that the commerce here involved was not interstate commerce.

(4) In People ex rel. Cornell Steamboat Company vs. Sohmer, 235 U. S. 549, a franchise tax was sustained, but the facts of that case indicated that the nature of the travel and the extent of the activity involved were quite different from that involved in the case at bar, and further the decision does not reveal that any claim was asserted that the gross revenue should be apportioned.

In that case, it appeared that the tax was imposed for towing charges upon the Hudson River. The business consisted largely of tows which were made up in the Hudson River at Albany, and thereupon the taxpayer attached a towing line connecting the tows with its tugs and moved the tows down or up river, leaving those tows upbound in the River at Albany, and those bound down the river, in the Bay at New York City. The facts also revealed that the tows for the up-river points were made at a stakeboat lo-

cated at Weehawken,[34] and vessels and boats going up the river are taken to those stakeboats, there made fast, and the tow is there made up. The course pursued by the steamers in going up the River was in the territory of New York and New Jersey. The decision further shows that it is absolutely impossible to state just when the vessels are within the territorial limits of either state (235 U. S. at 557.) The making up of the tows in the River below Weehawken was for "convenience in conducting domestic transportation." (235 U. S. at 560.)

The decision in the *Cornell* case indicates the minimal activity outside of New York State except for the plying of navigable waters up the Hudson River. No reference is made to transfers, lay-overs or stop-overs in the ports of New Jersey. It will be seen that the contacts and ties with the State of New Jersey are about limited to the touching of the waters which, as well, spill over the "line" into New York State. In the *Cornell* case, the taxpayer failed to show, though the opportunity was afforded to it before the Commission, the portion of the revenue attributable to its

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[34] The record on appeal indicates that even the stakeboats off Weehawken were within New York despite the statement in the decision, quoting an affidavit, to the contrary. (See Pages 20 and 21 in the record on appeal of the brief filed by the Attorney General.) It also appears that the tows may have passed through New Jersey, for the west half of the Hudson for about 10 miles. It was argued that because of the few miles navigated in New Jersey waters this was not interstate commerce. (Page 21 of brief of the Attorney General.)

towings outside of the State of New York, if there were any.

Lastly, the Cornell case is rested upon the convenience of the taxpayer in conducting domestic transportation. In the case at bar, what was involved was the convenience of conducting interstate transportation; namely, the servicing of the areas outside of New York State for not alone passengers who desired to go to points between the two states on tickets which so read, but for passengers who desired to go between the two states even though the ticket points of terminii were within New York State. It is submitted that the *Cornell* case does not stand for the proposition that an unapportioned gross receipts tax on interstate commerce is valid, for its conclusion is predicated upon the finding that it was not, in fact, interstate commerce, whereas no such finding of fact can properly be made in the case at bar. It is reiterated that the question of apportionment does not appear as having been raised in the *Cornell* case.

(5) In Ewing v. Leavenworth, 226 U. S. 464, this Court sustained, not a *gross receipts tax*, but a flat business and occupation tax of $50.00 which was imposed by the state on the business of receiving packages from points within the state and in transporting packages to like points. While the case was sustained as a privilege tax for the business done within the municipality, the so-called "interstate" aspect of the case could not and did not affect the size of the fee. While some of the packages delivered were transported into Missouri from Kansas and returned to Missouri, the case did not involve the imposition of a tax directly upon the revenue of such shipments. The case can

scarcely be cited for sustaining the contention that "this is not interstate commerce." All that the case decided was that there was no constitutional objection to the imposition of a flat occupation tax upon such business.

In summary, all of these cases cited above (1)-(5) and relied upon by the Court of Appeals below are distinguishable. When viewed in the light of the requirement for apportionment (*Lehigh Valley* and *United States Express Co.* cases) and distinctions based upon the *subject* of the tax (*Ewing* case—flat fee), and nature of the activity (*Cornell Steamboat* case—and failure to prove apportionment), these cases require a reversal of the decision below.

CONCLUSION.

JURISDICTION SHOULD BE TAKEN AND THE DECISION BELOW REVERSED.

The foregoing presentation, as to the merits of the case, and the nature of the substantial questions involved, indicates the need for reversal.

The impact of recent decisions of this Court upon old, but none the less revered, lines of authority, requires a decision.

This Court, with its ultimate power to adjust and accommodate the clash between the needs for State revenue and the needs of the Nation for freedom from obstruction of

interstate commerce, should make the determination and reverse the decision below.

All of which is respectfully submitted.

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APPENDIX "A"

"

New York State Tax Law.

§ 186-a. Emergency tax on the furnishing of utility services

1. Notwithstanding any other provision of this chapter, or of any other law, a tax equal to two per centum of its gross income for the period from July first, nineteen hundred thirty-seven, to March thirty-first, nineteen hundred forty-four, is hereby imposed upon every utility doing business in this state which is subject to the supervision of the state department of public service which has a gross income for the twelve months ending May thirty-first in excess of five hundred dollars, except motor carriers or brokers subject to such supervision under article three-b of the public service law and a tax equal to two per centum of its gross operating income is hereby imposed for the same period upon every other utility doing business in this state which has a gross operating income for the twelve months ending May thirty-first in excess of five hundred dollars, which taxes shall be in addition to any and all other taxes and fees imposed by any other provision of law for the same period.

2. As used in this section, (a) the word "utility" includes every person subject to the supervision of either division of the state department of public service, except persons engaged in the business of operating or leasing sleeping and parlor railroad cars or of operating railroads other than street surface, rapid transit, subway and ele-

vated railroads, and also includes every person (whether or not such person is subject to such supervision) who sells gas, electricity, steam, water, refrigeration, telephony or telegraphy, delivered through mains, pipes or wires, or furnishes gas, electric, steam, water, refrigeration, telephone or telegraph service, by means or mains, pipes, or wires; regardless of whether such activities are the main business of such person or are only incidental thereto, or of whether use is made of the public streets; (b) the word "person" means persons, corporations, companies, associations, joint-stock associations, co-partnerships, estates, assignee of rents, any person acting in a fiduciary capacity, or any other entity, and persons, their assignees, lessees, trustees or receivers, appointed by any court whatsoever, or by any other means, except the state, municipalities, political and civil subdivisions of the state or municipality, and public districts; (c) the words "gross income" mean and include receipts received in or by reason of any sale, conditional or otherwise (except sales hereinafter referred to with respect to which it is provided that profits from the sale shall be included in gross income) made or service rendered for ultimte consumption or use by the purchaser in this state, including cash, credits and property of any kind or nature (whether or not such sale is made or such service is rendered for profit), without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expense whatsoever; also profits from the sale of securities; also profits from the sale of real property growing out of the ownership or use of or interest in such property; also profit from the sale of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer

if on hand at the close of the period for which a return is made); also receipts from interest, dividends, and royalties, derived from sources within this state other than such as are received from a corporation a majority of whose voting stock is owned by the taxpaying utility, without any deduction therefrom for any expenses whatsoever incurred in connection with the receipt thereof, and also profits from any transaction (except sales for resale and rentals) within this state whatsoever; and (d) the words "gross operating income" mean and include receipts received in or by reason of any sale, conditional or otherwise, made for ultimate consumption or use by the purchaser of gas, electricity, steam, water, refrigeration, telephony or telegraphy, or in or by reason of the furnishing for such consumption or use of gas, electric, steam, water, refrigerator, telephone or telegraph service in this state, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expenses whatsoever.

3. Every utility subject to tax under this section shall keep such records of its business and in such form as the tax commission may require, and such records shall be preserved for a period of three years, except that the tax commission may consent to their destruction within that period or may require that they be kept longer.

4. [See also subd. 4 below] Every utility subject to tax hereunder shall file, on or before September twenty-fifth, December twenty-fifth, March twenty-fifth, and June twenty-fifth, a return for the three calendar months preceding each such return date including any period for which

the tax imposed hereby or by any amendment hereof is effective, each of which returns shall state the gross income or gross operating income for the period covered by each such return. Returns shall be filed with the tax commission on a form to be furnished by it for such purpose and shall contain such other data, information or matter as the tax commission may require to be included therein. Notwithstanding the foregoing provisions of this subdivision, any utility whose average gross income or average gross operating income, as the case may be, for the aforesaid three months' periods is less than fifteen hundred dollars, may file its returns for such periods on June twe -fifth, nineteen hundred thirty-nine, June twenty-fifth, nineteen hundred forty, June twenty-fifth, nineteen hundred forty-one, June twenty-fifth, nineteen hundred forty-two, June twenty-fifth, nineteen hundred forty-three, and June twenty-fifth, nineteen hundred forty-four, respectively. The tax commission, in order to insure payment of the tax imposed by this section, may require at any time a return, which shall contain any data specified by it. Every return shall have annexed thereto an affidavit of the head of the utility making the same, or of the owner or of a co-partner thereof, or of a principal officer of the corporation, if such business be conducted by a corporation, to the effect that the statements contained therein are true.

4. [See also subd. 4 above] Every utility subject to tax hereunder shall file, on or before September twenty-fifth, December twenty-fifth, March twenty-fifth, and June twenty-fifth, a return for the three calendar months preceding each such return date including any period for which the tax imposed hereby or by any amendment hereof is effective, each of which returns shall state the gross income or

gross operating income for the period covered by each such return. Returns shall be filed with the tax commission on a form to be furnished by it for such purpose and shall contain such other data, information or matter as the tax commission may require to be included therein. Notwithstanding the foregoing provisions of this subdivision, any utility whose average gross income or gross operating income, as the case may be, for the aforesaid three months' periods is less than fifteen hundred dollars, may file its returns for such periods on June twenty-fifth, nineteen hundred thirty-nine, June twenty-fifth, nineteen hundred forty, June twenty-fifth, nineteen hundred forty-one, June twenty-fifth, nineteen hundred forty-two, and June twenty-fifth, nineteen hundred forty-three, respectively, and the tax commission may require any utility to file an annual return, which shall contain any data specified by it, regardless of whether the utility is subject to tax under this section. Every return shall have annexed thereto an affidavit of the head of the utility making the same, or of the owner or of a co-partner thereof, or of a principal officer of the corporation, if such business be conducted by a corporation, to the effect that the statements contained therein are true.

5. At the time of filing a return as required by this section, each utility shall pay to the tax commission the tax imposed by this section for the period covered by such return. Such tax shall be due and payable at the time of filing the return or, if a return is not filed when due, on the last day on which the return is required to be filed.

6. In case any return filed pursuant to this section shall be insufficient or unsatisfactory to the tax commission, and

if a corrected or sufficient return is not filed within twenty days after the same is required by notice from the tax commission, or if no return is made for any period, the tax commission shall determine the amount of tax due from such information as it is able to obtain, and, if necessary, may estimate the tax on the basis of external indices or otherwise. The tax commission shall give notice of such determination to the person liable for such tax. Such determination shall finally and irrevocably fix such tax, unless the person against whom it is assessed shall, within thirty days after the giving of notice of such determination, apply to the tax commission for a hearing, or unless the tax commission, of its own motion shall reduce the same. After such hearing, the tax commission shall give notice of its decision to the person liable for the tax. The decision of the tax commission may be reviewed by certiorari, if application therefor is made within thirty days after the giving of notice of such decision. An order of certiorari shall not be granted unless the amount of any tax sought to be reviewed, with penalties thereon, if any, shall be first deposited with the tax commission and an undertaking filed with it, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that, if such order be dismissed or the tax confirmed, the applicant for the order will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding, or at the option of the applicant, such undertaking may be in a sum sufficient to cover the tax, penalties, costs and charges aforesaid, in which event the applicant shall not be required to pay such tax and penalties as a condition precedent to the granting of such order.

7. The same remedies shall be available for the recovery of any tax or penalty imposed by this section as are

available for the recovery of other taxes and penalties imposed by this article.

8. Any notice authorized or required under the provisions of this section may be given by mailing the same to the person for whom it is intended, in a postpaid envelope, addressed to such person at the address given by him in the last return filed by him under this section, or, if no return has been filed, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time, which is determined according to the provisions of this section by the giving of notice, shall commence to run from the date of mailing of such notice.

9. Any person failing to file a return or corrected return, or to pay any tax or any portion thereof, within the time required by this section shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof, excepting the first month, after such return was required to be filed or such tax became due; but the tax commission, if satisfied that the delay was excusable, may remit all or any portion of such penalty.

10. If, within one year from the payment of any tax or penalty, the payer thereof shall make application for a refund thereof and the tax commission or the court shall determine that such tax or penalty or any portion thereof was erroneously or illegally collected, the tax commission shall refund the amount so determined. For like cause and within the same period, a refund may be so made on the initiative of the tax commission. However, no refund shall

be made of a tax or penalty paid pursuant to a determination of the tax commission as hereinbefore provided unless the tax commission, after a hearing as hereinbefore provided; or of its own motion, shall have reduced the tax or penalty or it shall have been established in a certiorari proceeding that such determination was erroneous or illegal. All refunds shall be made out of moneys collected under this article deposited to the credit of the comptroller, with the approval of the comptroller. An application for a refund, made as hereinbefore provided, shall be deemed an application for the revision of any tax or penalty complained of and the tax commission may receive additional evidence with respect thereto. After making its determination, the tax commission shall give notice thereof to the person interested, and he shall be entitled to a certiorari order to review such determination, subject to the provisions hereinbefore contained relating to the granting of such an order.

11. If any provision of this section conflicts with any other provision contained in this article, the provision of this section shall control, but the provisions of this article which do not conflict with the provisions of this section shall apply with respect to the taxes under this section, so far as they are, or may be made, applicable.

12. The tax imposed by this section shall be charged against and be paid by the utility and shall not be added as a separate item to bills rendered by the utility to customers or others but shall constitute a part of the operating costs of such utility.

13. Notwithstanding any other provision contained in this or any other law, in the event the city of New York

shall enact a local law imposing a tax on utilities, such as is imposed by this section, except as to the rate of tax, the tax commission, in its discretion, may arrange with the chief fiscal officer of said city for the collection by him of the tax imposed by this section with respect to items that enter into the tax base for both the tax imposed by said city and that imposed pursuant to this section, and for the remittance by him of the tax imposed by this section to the tax commission for disposition as in this article provided. If such an arrangement be made, all the provisions of the local law of said city imposing the local tax shall apply with respect to the tax imposed by this section in the same manner as if the local tax rate had included the tax imposed by this section.

14. The remedy provided by this section for review of a decision of the tax commission shall be the exclusive remedy available to any taxpayer to judicially determine the liability of such taxpayer for taxes under this section." Added L. 1937, c. 321, §1; amended L. 1938, cc. 67, 293, 384, 710; L. 1939, c. 936, §1; L. 1940, c. 131, §1; L. 1940, c. 494; L. 1941, c. 137, §2; L. 1942, c. 168, §1; L. 1942, c. 780; L. 1943, c. 120, §1, eff. March 16, 1943; L. 1943, c. 260, eff. April 3, 1943; L. 1943, c. 424, §1, eff. April 13, 1943. Further amended L. 1944, c. 115, §1; L. 1945, c. 120, §1; L. 1946, c. 110, §1; L. 1947, c. 89, §1, eff. April 1, 1947.

APPENDIX "B"

New York State.

Legislative intent; effective date; retroactive effect. L. 1941, c. 137, §§1, 3, 4, provided as follows:

"Section 1. Declaration of legislative intent. The two per cent tax on persons selling or furnishing utility services imposed by section one hundred eighty-six-a of the tax law was enacted on May seventh, nineteen hundred thirty-seven, upon the recommendation of the governor as an emergency measure to aid in financing the extraordinary cost of relief. The governor's recommendation was that the tax be imposed on the furnishing of 'utility services.' It was intended to impose a tax on such services whether rendered by utilities in the strict sense or not, whether such services were the main or incidental part of their business and regardless of whether the public streets were used in any manner. Accordingly, the law defined a utility, for the purposes of the tax, as including every person subject to the supervision of the department of public service and every other person furnishing utility services. It was intended to include persons and corporations which were directly in competition with ordinary utilities, such as, landlords and submeterers, who buy their services from other utilities and, in turn, resell such services. For that reason the tax was imposed on receipts from sales to ultimate consumers. Receipts from the sale of such utility services to submeterers were not taxed, but receipts of submeterers from their own customers were intended to be taxed. Any other construction would have resulted in a complete exemption from taxation of utility services sold or furnished by this particular method. Accordingly, prior

to a decision by the court of appeals, which decided that submeterers were not subject to the tax, these submeterers considered themselves as taxable and their charges to their customers took into consideration as part of their operating cost the additional burden of the tax.

"In view of the fact that these landlords or submeterers have considered themselves as subject to tax, have based their charges to their customers in consideration of the tax and are in competition with ordinary utilities, this act, making it clear that they are required to include in gross operating income receipts from sales or services similar to those rendered by ordinary utilities, is made retroactive to the original enactment of this tax.

"Furthermore, it is believed that submeterers have common characteristics that distinguish them from other businesses and justify the conclusion that the method, character and nature of their business, in this aspect, is substantially similar to the business of an ordinary utility and requires similar treatment for purposes of the tax. This conclusion is strongly fortified by the fact that such landlords and submeterers are in direct competition with ordinary utilities, and hence should bear similar tax burdens in order to avoid inequality of treatment."

"§3. This act shall take effect immediately. The amendments made by this act to subdivision two of section one hundred eighty-six-a of the tax law shall be deemed to have the same force and effect as if enacted on May seventh, nineteen hundred thirty-seven, and the tax imposed or continued by this act shall be deemed to have been validly enacted as of such date and continued from year to year by the amendments made to subdivision one of said section.

"§4. In the event that the amendments made to subdivision two of section one hundred eighty-six-a of the tax law by this act are declared by a court of competent jurisdiction to be invalid to the extent that they are made retroactive to May seventh, nineteen hundred thirty-seven, then the tax imposed or continued by such amendments shall be applicable to recent transactions since January first, nineteen hundred forty."

APPENDIX "C"

Pennsylvania Law.

(1) Motor Vehicle Carriers

Act of June 22, 1931, P. L. 694

"Sec. 1. Excise tax on gross receipts; transportation companies using public highways; definitions.—That the word "company" as used in this Act, shall be construed to mean any individual who, or copartnership, corporation, joint-stock association, or association of individuals whatsoever which, shall engage in the business of carrying passengers or property for hire over the highways of this Commonwealth in motor vehicles or trackless trolleys. For the purposes of this Act, the term "motor vehicle" shall be construed to mean every vehicle which is self-propelled, except such as move upon or are guided by a track erected upon the highways.

Sec. 2. Semi-annual report to be filed with the Department of Revenue.—Each company shall pay an excise tax for the use of the highways of this Commonwealth. For the purpose of ascertaining the amount to be paid, each

such company shall, on or before the first day of February of each year, file with the Department of Revenue, on forms prescribed and furnished by it, a report, under oath or affirmation, setting forth: (1) The name and address of the company owning or operating such motor vehicle or vehicles; (2) the location of the principal place of business of such company; (3) the name and address of the person in this Commonwealth upon whom service of process or other notice may be had against such company; (4) a schedule, if any, if not, a description of the routes over which such company shall have operated over the highways in this Commonwealth during the period for which the report is filed; (5) the number of miles of all routes over which such motor vehicle or motor vehicles shall have been operated by such company during the period for which the report is filed; (6) the number of miles within this Commonwealth of all such routes so operated during the period for which the report is filed; and (7) the amount of gross receipts of such company from all sources upon its operations during the period for which the report is filed, and such other relevant information as the Department of Revenue may require in connection with the settlement of the excise tax hereinafter provided, for the calendar year immediately preceding the first day of January of each year. (*As amended by Act of June 5, 1947, No. 204, effective immediately.*)

Sec. 3. Amount of tax; deductions.—The amount of excise tax annually to be paid by each company specified in Section one of this act shall be as follows: (1) In case of a company operating routes which are entirely within the limits of this Commonwealth, eight (8) mills upon the dol-

lar upon the gross receipts of such company from all operations for the period covered by such report; and (2) in case of a company operating over routes when only a part of such routes lies within this Commonwealth, eight (8) mills upon the dollar upon such portion of the gross receipts of such company as is represented by the ratio that the number of miles of routes operated in this Commonwealth by such company, during the period for which the report is filed bears to the total number of miles of all routes operated by such company during said period. The provisions hereof shall not be construed as exempting any company from complying with the laws relating to fees payable to the Department of Revenue for the registration of motor vehicles. In the event, however, that an excise tax shall be paid by any company to any city of this Commonwealth for the use of its highways, during the period for which the report is filed, the amount of such tax, so paid, may be deducted from the amount of tax payable to the Commonwealth, as above computed, upon satisfactory proof to the Department of Revenue of such payment; and, in addition thereto, where any such company shall have paid to the Department of Revenue a registration fee or fees, as provided for by the laws of this Commonwealth, upon any motor vehicle or motor vehicles used in the business of carrying passengers or property for hire over the highways of this Commonwealth, it shall receive a credit in each settlement for gross receipts tax made hereunder to the extent of the total amount of the registraion fee or fees paid for the calendar year of which the period covered by the settlement was a part. (*As amended by Act of June 5, 1947, No. 204, effective immediately.*)"

(2) Franchise Tax.

* * * * *

(b) *Tax of five mills on capital stock of foreign corporation, etc.; the actual value of whole capital stock shall be divided into 3 equal parts.*—Every foreign corporation, joint-stock association, limited partnership, and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to and pay into the treasury of the Commonwealth annually, through the Department of Revenue, a franchise tax at the rate of five mills upon a taxable value to be determined in the following manner. The actual value of its whole capital stock of all kinds, including common, special, and preferred, shall be ascertained in the manner prescribed in the twentieth section of this act, and shall then be divided into three equal parts. (*As added by Act of May* 16, 1935, *P. L.* 184.)

* * * * *

(3) Of the remaining third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said third by a fraction, whose numerator is the amount of the taxpayer's gross receipts from business, not strictly incident or appurtenent to manufacturing in this Commonwealth assignable to this Commonwealth as hereinafter provided, and whose denominator is the amount of the taxpayer's gross receipts from all its business. (*As added by Act of May* 16, 1935, *P. L.* 184 *and as amended by Act of May* 27, 1943, *P. L.* 762.)

* * * * *

Amount of gross receipts from business assignable to the Commonwealth; if a taxpayer maintains office, etc., outside

of State to reduce the amount of tax.—The amount of the taxpayer's gross receipts from business assignable to this Commonwealth shall be (1) the amount of its gross receipts for the taxable year, except those negotiated or effected in behalf of the taxpayer by agents or agencies chiefly situated at, connected with, or sent out from premises for the transaction of business maintained by the taxpayer outside the Commonwealth, and except rents and royalties, and interest and dividends, (2) rentals or royalties from property situated or from the use of patents within this Commonwealth, and (3) dividends and interest, except such dividends and interest attributable to the business conducted on premises maintained by the txpayer outside the Commonwealth. If a taxpayer maintains an office, warehouse, or other place of business in a state other than this Commonwealth for the purpose of reducing its tax under this subsection, the Department of Revenue shall, in determining the amount of its gross receipts from business assignable to this Commonwealth, include therein the gross receipts attributed by the taxpayer to the business conducted at such place of business in another state. (*As added by Act of May* 16, 1935, *P. L.* 184; *and as amended by Act of April* 8, 1937, *P. L.* 239; *Act of May* 16, 1945, *P. L.* 606.)


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 745

CENTRAL GREYHOUND LINES, INC., OF NEW YORK,

Appellant,

vs.

CARROLL E. MEALEY, JOHN F. HENNESSEY AND JOSEPH M. MESNIG, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

NATHANIEL L. GOLDSTEIN,
Attorney General of New York.
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Solicitor General,
JOHN C. CRARY, JR.,
Assistant Attorney General,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 745

CENTRAL GREYHOUND LINES, INC., OF NEW YORK,

Petitioner-Appellant,

vs.

CARROLL E. MEALEY, JOHN F. HENNESSEY AND JOSEPH M. MESNIG, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Respondents-Appellees

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

Now come the appellees in the above entitled cause by their counsel of record and submit their statement in opposition to jurisdiction and move that the appeal herein be dismissed or that the order and judgment appealed from be affirmed.

Statement

This is an appeal from an order and judgment of the Court of Appeals of the State of New York embodied in its

Remittitur, dated July 23, 1946, as amended upon motion of the appellants by order dated October 15, 1946. That Court unanimously affirmed an order of the Appellate Division of the Supreme Court, Third Judicial Department, which confirmed a final determination of the appellees, comprising the State Tax Commission. The proceeding is in the nature of certiorari under Article 78 of the New York Civil Practice Act brought to review appellees' determination affirming assessments of taxes under Section 186-a of the New York Tax Law.

Appellant is a common carrier engaged in transporting passengers by omnibus. The statute involved imposes an emergency tax of two per cent of gross income on any utility doing business in the State which is subject to the supervision of the State Department of Public Service. The definition of gross income includes "receipts received in or by reason of any sale • • • made or service rendered for ultimate consumption or use by the purchaser in this state".

The controversy is concerned only with taxation of that part of appellant's receipts which is derived from continuous transportation of passengers between points in New York State where part of the route traverses other States. The regular route of appellant's buses from New York City to Buffalo and other points in upstate New York crosses parts of New Jersey and Pennsylvania. Application of the tax to receipts from transportation moving entirely within the State is not contested and transportation which does not both originate and terminate within the State has not been taxed. There is no dispute as to the proportion of mileage within and without the State. The controversy relates to operations for the month of July, 1937, selected as a test period by agreement of the parties (Court of Appeals Record, fols. 85-86). As to that month

it was agreed that 57.47 per cent of the total mileage of the journeys concerned was traversed within the State of New York, and 42.53 per cent thereof was traversed without the State (Record, fols. 163-164).

Review by this Court is now sought upon assignments alleging error upon the part of the Court of Appeals in holding that there was no constitutional objection under the interstate commerce clause to taxation of that part of the total receipts attributable to mileage without the State of New York, and in holding that Section 186-a of the Tax Law, construed as applying to appellant's entire income from the transportation involved, is valid. The constitutional issue thus sought to be raised was not directly or necessarily passed on by the Court of Appeals.

The petition of appellant in the New York Supreme Court alleged that construction of the statute as applying to its total receipts from the trips involved was contrary to the statute and unconstitutional, and further, that the assessment of taxes was void in that it did not eliminate the income from services "consumed and used" within the States of New Jersey and Pennsylvania. However, upon transfer of the case to the Appellate Division of the Supreme Court for disposition in the first instance, pursuant to Civil Practice Act, Section 1296, petitioner's argument centered itself upon the construction of the statute. The contention was that the general language with respect to utility services "consumed or used" in the State did not reach any bus transportation going partly outside the State, even though between two points therein, and could at most be applied only with respect to that part of the journey which traversed the State. Doubts as to the constitutionality of taxing the entire receipts under the interstate commerce clause were put forth as lending weight to the construction argument and, more particularly, as requiring

the decree, decedent's Reno attorney was advised that one of respondent's attorneys had received reinstatement of this previously revoked authorization. For what purpose these facts have now been recited for the first time is open to conjecture. Certainly they have no bearing upon the case as now presented. The fact remains that *no appearance was ever entered by the respondent in the divorce action which had been instituted against her by the decedent in Reno, Nevada (Amendment to Report of State Referee, par. 5, Rec. p. 7), (See also Rec. p. 46).*

For a proper consideration of this case the following facts should be added to the statement of the case contained in petitioner's brief, pages 2-4.

When the decedent discontinued his automobile business in New Haven in 1942 all of the equipment which was not sold or leased was stored in the decedent's residence in Woodbridge. (Rep. of State Referee, Par. 2, Rec. p. 5.)

The bulk of the large units were stored in the Woodbridge home and a few items were leased. (Rec. p. 133.)

Excepting for parts which had to be used, all of the rest of the equipment, tools, hoists, etc. were either stored in the Woodbridge home or leased. (Rec. p. 142.)

During the period that the decedent was employed in Springfield Mass., down to the time of his departure for Reno in March 1944, he told the respondent and others that his job in Springfield was a temporary one, and that when the war was over he intended to return to Woodbridge and reopen his automobile business. He also retained his home in Woodbridge during all of that period. (Rep. of State Referee Par. 3, Rec. p. 5.) (See also Rec. pp. 64, 76, 77, 84, 87, 126, 133, 138.)

During the period that Mr. Rice was in Springfield, the respondent on many occasions visited him in Springfield where they both

occupied the same room in the Hotel Kimball, and all registrations in the hotel register save one or two when respondent arrived first, on said occasions were in the handwriting of Mr. Rice, giving his home residence as Woodbridge, Connecticut. (Rec. pp. 90-93.)

In February, 1944, decedent told the petitioner that he had consulted an attorney in Springfield who *told* him to go out to Reno to get a divorce. (Rec. p. 173.)

Before leaving for Reno, Nevada, Mr. Rice notified petitioner that if he secured his divorce in Nevada, he would notify the petitioner by a code telegram and would ask her to marry him. (Rec. p. 174.)

After Mr. Rice left for Reno, Nevada, in March, 1944, the respondent received each week by mail from Springfield, Mass., for a period of six successive weeks, a check for $15.00 signed by Mr. Rice, each check being dated March 16, 1944. (Rec. pp. 109, 110.)

When Rice went to Reno in March, 1944, he went there for the sole purpose of obtaining a divorce from the respondent. (Amdt. to Rep. of State Referee, Par. 5, Rec. p. 7; see also Rec. pp. 51, 162, 173, 175.)

During the period that Rice lived in Reno, he lived in a rooming house which he had rented by the week, and he obtained a job at war work in Reno, which job he resigned on July 2, 1944, the day before he and the petitioner were married. (Rep. of State Ref. Par. 6, Rec. p. 6.)

Before obtaining his divorce decree on June 13, 1944, Rice told his attorney in Reno that he had made application to the Army Employment Agency for a job, and asked his attorney if it would be all right for him to take such a job at Herlong, Cal., and was told that it was perfectly all right to do so. (Rep. of State Ref. Par. 6; Rec. p. 6; see also Rec. p. 52.)

On July 15, 1944, the decedent and the petitioner went to Herlong, Cal. where Rice obtained a war job. After moving to Herlong he continued to pay rent for the room in Reno, Nevada, but at a reduced rate per week. (Rec. p. 167.)

This rented room was a bedroom about 10 feet x 12 feet or 12 feet x 14 feet in size. (Rec. p. 196.)

During Rice's absence in Herlong, Cal., this rented bedroom in Reno was occupied by others and the door to the same was not locked. (Rec. pp. 168-170.)

At infrequent intervals and not every week Rice and his new wife occupied said rented bedroom in Reno occasionally on week ends. (Rec. p. 168.)

The reason why Rice continued to pay rent for the room in Reno was because he did not know whether his job in Herlong, Cal., would be permanent, or whether he and his wife would like it there, and if they did not like it they intended to return to Reno. (Rep. of State Referee Par. 7; Rec. p. 6); (see also Rec. p. 181).

Argument

The sole question presented in this case is whether the decedent, Rice, had a bona fide domicil in the State of Nevada at the time he secured his divorce from the present respondent. It would appear that all parties are in accord that the decision of this court in the case of *Williams* vs. *North Carolina*, 325 U. S. 226; 65 S. Ct. 1092, is the controlling case on the issues presented, and that the parties agree that the State of Connecticut had jurisdiction to go into the question of domicil and determine the above question.

The cases of *Sherrer* vs. *Sherrer*, 334 U. S. 343; 68 S. Ct. 1087 and *Coe* vs. *Coe*, 334 U. S. 378; 68 S. Ct. 1094 have in no way changed the law as laid down in the second of the *Williams* cases. These two cases merely state that where a defendant in a divorce

action in a foreign state has submitted to the jurisdiction, either by contesting the case or by merely entering an appearance through counsel and then not contesting, he or she is thereafter precluded from litigating the question of domicil in any court.

Whether the defendant wavers in arriving at a decision as to entry of appearance has no bearing on the matter. The only question is whether an appearance through counsel or otherwise was ever entered in the foreign jurisdiction.

In this brief we will attempt to take up consecutively the alleged errors relied upon by the petitioner which are six in number and are set forth on pages 4 and 5 of her brief.

I

The Ultimate Conclusion of the Connecticut Court is Supported by Evidence That Was Material and Relevant

Petitioner claims that all evidence admitted in the case concerning the relations between the respondent and her husband from the time of their marriage until the decedent left for Nevada in March, 1944, and especially with reference to the time subsequent to the date in September, 1942, when the decedent left Connecticut to work in Springfield, Mass., was irrelevant and immaterial.

Petitioner, in her brief (pp. 6, 7) refers to a number of cases in which a foreign divorce was held to be invalid because of lack of domicil. In all of these cases one of the most important facts was that the party securing the foreign divorce shortly thereafter returned from the foreign jurisdiction to the previously existing home state, or as in the case of *Esenwein* vs. *Pennsylvania*, 325 U. S. 279; 65 S. Ct. 1118, went to a third state shortly after securing the divorce.

Petitioner's brief then pursues a most unique line of argument to the effect that because of the facts in these particular cases the

rule must be that the only evidence material in proving a lack of domicil is evidence which arises after the change of residence.

We agree that in all of these cases referred to by petitioner the fact of an almost immediate return to the original domicil would carry tremendous weight in disproving a bona fide intention to acquire a new domicil, *but it by no means follows that such evidence is the only evidence that is material on the question of intention.*

Assume that a party is leaving his home state for Reno, Nevada, to secure a divorce, and has stated to various people up to the very moment his train departs that he intends within a short time to return to his former home. Upon arrival in Reno, however, after securing legal advice, he states to every one he meets that he intends to make Nevada his permanent home. Does petitioner contend that all evidence of his statements prior to boarding the train are irrelevant and immaterial in attacking the credibility of his later statements? We hardly believe that such a claim will be very forcibly pressed.

Petitioner's brief, page 8, further proceeds to cite certain cases where a foreign divorce was held to be valid and domicil properly proven. In *Dalton* vs. *Dalton*, 270 App. Div. 269; 59 N. Y. Sup. 2nd 68 the evidence discloses that the husband had lived continuously in the State of Illinois for four years before instituting divorce proceedings there and all of the evidence was adequate to prove that he had definitely established his domicil in Illinois. Having established this new domicil, it is important to read that portion of the opinion on page 71 of the latter citation which gives consideration to the fact that the party domiciled in Illinois went to another State.

> "Temporary residence in the District of Columbia for an indefinite period while in government service is not ordinarily enough in and of itself to deprive the federal employee of his domicil of origin."

This case is strong authority in support of respondent's claim that Rice's original domicil in Connecticut was never destroyed by his temporary employment in government service in Reno, Nevada, or later in Hemlong, Cal.

To the same effect is the case of *Commonwealth* vs. *Berfield*, 160 Penn. Super. 138, where lack of domicil was found. In that case a former resident of Pennsylvania secured a Florida divorce decree on April 17, 1945 and did not return to his home state of Pennsylvania until August 22, 1945. At page 449 of the opinion, the Court says, "Profitable *employment in war work and not domiciliary intent* kept him in Florida until that date."

In *Baldwin* vs. *Baldwin*, 28 Cal. 2nd 406; 170 Pac. 2nd 670 there were many facts to support the claim of domicil which petitioner significantly omits from her brief. For instance the defendant in that case, on July 31, 1939, moved all of his personal effects to Nevada; thereafter he resided continuously in Nevada down to October 13, 1939, the date when his complaint for divorce was filed, and continued to reside there thereafter until July 10, 1944. During all of the first period referred to, he opened a bank account in Nevada, he rented a safe deposit box there, he paid his personal property taxes there, he registered to vote and voted there; he registered under the selective service act as a resident of Nevada, he registered his automobile in Nevada, he filed his income tax returns there, and participated in many civil and political affairs.

We heartily agree that there was a case where domicil was adequately proven, but we do not agree that this case, any more than any of the others cited, justifies the contention that in the case before us no evidence should have been admitted as to Rice's statements or conduct prior to his boarding the train for Nevada, only a day or two before arriving there and immediately consulting a Reno lawyer regarding divorce.

In the case of *Estin* vs. *Estin*, 63 N. Y. Sup. 2nd. 476, the subordinate facts again were strong enough to justify a conclusion that a change of domicil had been accomplished.

The case of *In re Paul's Estate*, 135 Pac. 2nd. 284 is cited by the petitioner as one in which the facts were "strikingly similar to the case at bar." Petitioner neglects, however, to recite many of the subordinate facts which are far from similar to the case before us. For instance in that case the party before leaving his home sold his business there. He also took with him to Nevada all of his personal belongings. Before leaving he told his former partner inbusiness that he was going to look for a business location outside of his home state of California. After arriving in Nevada, he wrote his first wife that he liked Reno and that the business possibilities there were good, and that he was looking for a building in which to set up his business.

It is interesting to note how the appellate court passed upon the question of domicil. The opinion at page 287 reads as follows:

> "The evidentiary facts relied upon by appellant, together with the inferences in her favor therefrom, merely serve to create a *conflict in the evidence* and under such circumstances, the court *findings cannot be disturbed.*"

Intention is a state of mind. Here the party whose state of mind we are trying to determine is deceased. Are his statements to his frineds and associates, almost down to the time of his departure from Springfield, to be utterly ignored? Have we no right to consider that he left under lease in Connecticut some of the assets of the corporation in which he was vitally interested and stored in his home in Connecticut the bulk of the large units? Are we to ignore the fact that he left other personal belongings and clothes in this home in Connecticut and never sent for them up to the time of his death? Are we to ignore the fact that almost down to the time of his departure for Nevada, he had been on amicable terms with his wife, and had stayed with her in his home in

Connecticut, and had received visits from her in Springfield, without expressing any intention other than one to eventually return to his home in Connecticut? Are we to ignore many other equally important subordinate facts concerning decedent's actions before departing for Nevada, all of which throw considerable light on his state of mind?

One of the grounds for offering some of the foregoing evidence was in support of the allegations of paragraph 3 of respondent's complaint alleging that Mr. Rice had retained his Connecticut domicil during all of the period during which he was in Massachusetts, which was denied in petitioner's answer. The fact that petitioner's counsel, at some period in the trial of the case, realized his tactical error in pleading in a manner that weakened his case, and stated his willingness to admit this paragraph, has no bearing. We were entitled to try the case as it was set up in the pleadings and to have the benefit of any inferences fairly to be drawn therefrom.

Actually much of this evidence was offered and admitted for the general purpose of showing that Rice's residence and domicil continued in Connecticut to the date of his death and that he never acquired a residence in Nevada. (Rec. pp. 57 and 58.) It was also offered and admitted as bearing on the probability that Rice did or did not abandon his domicil in Connecticut as the law requires and adopt as the law requires a new domicil elsewhere. (Rec. p. 95.)

It was for the trial court to determine what weight should be given to this evidence, but we can conceive of no court, even in the State of Nevada, that would rule that such evidence was immaterial and irrrelevant on the question of intention and therefore inadmissible.

II

Abandonment of Former Domicil is a Necessary Element in Proving Change of Domicil

Petitioner claims that the Connecticut Supreme Court was in error in adopting its prior opinions in the cases of *Morgan* vs. *Morgan*, 103 Conn. 189; 130 Atl. 254 and *McDonald* vs. *Hartford Trust Co.*, 104 Conn. 169; 132 Atl. 902.

In *Restatement of the Law, Conflict of Laws, Sec.* 23 the proposition is laid down that a domicil once established, continues until it is superseded by a new domicil.

In the *Morgan* case the court, after so stating the law, concluded that "proof of the acquisition of a new domicil of choice is not complete without evidence of the abandonment of the old." Certainly no fault can be found with such a statement. It is true that to effectuate a change of domicil a party must prove a present intention of remaining there permanently. The foregoing quotation from the *Morgan* case means nothing more than that satisfactory proof of a present intention of remaining permanently in a new home is not complete unless there has been some evidence presented of an intention to abandon the former home. The *McDonald* case merely points out that even though one has left a former home and has no intention of returning there, the former home still remains the domicil until a new one has been acquired.

In the case before us petitioner did present some evidence to the effect that Rice never intended to return to Connecticut. The Connectnicut court has nowhere rested its decision on any failure to present any such evidence. The *Morgan* case and the *McDonald* case are merely cited to show that such evidence alone is not sufficient to prove a new domicil. In other words, no matter what Rice's intention may have been as to never returning to Connecticut, he still, as a matter of law, had not abandoned his Connecticut domicil until he had acquired a new one elsewhere.

III

The Connecticut Court Did Not Shift the Burden of Proof Onto Petitioner

Petitioner complains of the language of the Connecticut Supreme Court (Rec., p. 214) to the effect that the "attack upon the quoted finding of the Referee cannot succeed unless the subordinate facts are sufficient to establish as a matter of law that Rice had acquired a new domicil in Nevada," and argues that this is tantamount to a shifting of the burden of proof from the plaintiff to the defendant.

If we turn to page 213 of the Record we find that the finding of the Referee, which was under attack by the present petitioner, was the final paragraph of his report that, "Rice never established a home in Reno. He intended to do so in the future if he did not like it at Herlong, but did not have an unqualified intention to make a home there at present and Reno was not his bona fide domicil." The opinion then goes on to point out that this paragraph was "a conclusion drawn from the subordinate facts and inferences therefrom. In order to be sustained, it must have been logically drawn from these facts without violation of the plain rules of reason."

The opinion (Rec. p. 214) definitely states that the "*burden was upon the plaintiff* to prove that Rice did not have a domicil in Reno, and that therefore the Nevada court had no jurisdiction." Whether the Referee's conclusion was one correctly drawn from the subordinate facts was a question of law. The subordinate facts as found by the trial court are not complained of. The trial court concluded from these subordinate facts that the plaintiff *had sustained her burden of proof* that no domicil had been acquired in Nevada. The only basis for the appellate court to disturb such a conclusion would be on the ground that it was illegally or illogically arrived at from the subordinate facts.

In stating this to be the law, the Connecticut court in no way shifted the original burden of proof from the plaintiff to the defendant, but was only stating the law under which the present petitioner could attack the conclusion of the trial court.

IV

Finding That Rice Went to Reno for the Sole Purpose of Obtaining a Divorce is Supported by All of the Evidence

For direct affirmative evidence as to Rice's reason for going to Nevada, we refer to the testimony of the petitioner herself appearing on page 173 of the Record. After first stating that it was the early part of February, 1944, when she first learned that Rice was going to Reno, she then testified as follows:

> "Q. From whom did you learn it? A. From Mr. Rice himself. Q. In that conversation, if you can remember it, what did he say about going to Reno? A. He said that he had spoken to an attorney in Springfield. Q. Did he give you the attorney's name? A. Yes, sir a Mr. Gerald Callahan. Mr. Callahan *told him to go out to Reno to get a divorce.*
> "

Again on page 175 of the Record, petitioner's counsel, in addressing a question to her, used the following language:

> "Q. When Mr. Rice told you sometime in February, 1944, that *he was going to Reno for the purpose of getting a Divorce*
> "

In the deposition of Mrs. Matson at page 162 of the Record, Mrs. Matson, in answer to a question as to circumstances under which she became acquainted with Mr. Rice, replied as follows:

> "He came to my house for a room. *He came to get a divorce.*"

There is plenty of other evidence from which proper inferences may be drawn showing that divorce was the sole motive for the trip

to Nevada. It appears from the deposition of Attorney McLaughlin (Rec. p. 51) that he first became acquainted with Herbert N. Rice on March 23, 1944, *the very day of his arrival in Reno:*

"Q. What were the circumstances under which you became acquainted with him? A. He arrived at my office and retained me to represent him in a divorce action."

On pages 109 and 110 of the Record is the respondent's testimony showing that after Rice left for Reno in March, 1944, she received by mail from Springfield, Mass., each week for a period of six successive weeks a check for $15.00 signed by Mr. Rice, each check being dated March 16, 1944. It is significant that he made this arrangement for the support of his first wife only for the period of six weeks, which was the residential period required under the Nevada law before a divorce action could be instituted.

Again on page 174 of the Record appears the testimony of the petitioner regarding the code telegram which Rice was to send her if he secured his divorce.

Even if there was evidence to the contrary, the foregoing evidence would entirely justify a finding that divorce was the sole motive for Rice's going to Nevada. Emphasis is given to all of this evidence by reason of the fact that no evidence whatsoever to the contrary was presented. No claim was made that he went to Reno for reasons of health, or business, or because he was attracted to the place for any reason other than its easy divorce laws.

Petitioner argues on page 12 of her brief that the finding of the Referee as to motive was based solely on disbelief of contrary statements made by Mr. Rice. We challenge petitioner to point out anywhere in the evidence one single statement by Rice, or any other evidence to the effect that he went to Reno for any purpose other than that of obtaining a divorce.

We have repeatedly stated throughout this case that we make no claim that a person's motive in acquiring a new home is con-

clusive on the question of domicil, or that a motive to avail oneself of the more liberal divorce laws of a State would necessarily prevent the acquisition of a new domicil. We do, however, claim, in the language of *Gildersleeve* vs. *Gildersleeve*, 88 Conn. 689, 694 "these considerations are indeed pertinent to the question of the *good faith* character of the change of abode." See also *State* vs. *Cook*, 110 Conn. 348, 351.

In *Nelson on Divorce, paragraph* 21.17 the following statement appears:

> "Motive may be immaterial in the court of first instance and other courts of the state in which the divorce is sought, particularly if it is a come hither divorce state, but it is clearly one of the factors considered when the validity of the divorce they grant comes in question elsewhere."

In *Hall* vs. *Hall*, 199 Miss. 478, a case cited in petitioner's brief, the following appears at page 490 of the opinion:

> "An intent to acquire permanent residence so as to qualify one for divorce proceedings may well be belied by making the latter predominate. Accent is shifted from that which is the means to that which constitutes the end."

On page 15 of petitioner's brief appears a most original argument. It is first stated that since the decedent's presence in Nevada is undisputed, the only ultimate fact left to be found is his state of mind when he went to Nevada or while he was there. Petitioner therefore concludes that a statement that he went there for the sole purpose of obtaining a divorce is the equivalent of a statement that his domicil was not changed. Although this contradicts the claim previously made that motive is immaterial, apparently such argument is resorted to in order to make it appear that the Connecticut court has attempted to dispose of the constitutional claim by casting it in the form of an unreviewable finding of fact. We have already pointed out that we do not claim, nor did the Connecticut court hold, that decedent's motive was controlling, but only that it was *material on the question of his good faith*.

V

The Ultimate Conclusion of the Connecticut Supreme Court of Errors is Supported by the Evidential Facts and the Proper Inferences Therefrom

Petitioner's entire argument is based on the proposition that the only material evidence consists of statements and conduct of Mr. Rice subsequent to the moment of his departure for Nevada. Although we by no means concede this, let us briefly summarize the evidence from the moment Mr. Rice boarded the train for Reno on March 19, 1944, with his domicil admittedly existing in Connecticut for many years prior thereto.

1. On March 23, 1944, Rice arrived in Reno and rented a room at Mrs. Matson's, to whom he apparently stated on that day that he had come to Nevada "to get a divorce." (Rec. p. 162.)

2. This room consisted of a bedroom about 10 ft. x 12 ft. or 12 ft. x 14 ft. in size. (Rec. p. 196.)

3. On March 23, 1944 the day of his arrival in Reno Rice consulted an attorney to whom he stated on that day that "he wanted a divorce." (Rec. p. 51.)

4. On March 23, 1944 the Reno attorney explained to Mr. Rice that it would be necessary for him to reside in Reno for a period of forty-three days before the court would accept his complaint in a divorce action. (Rec. p. 52.)

5. The complaint in the divorce action instituted by Rice in Reno was dated May 5, 1944, exactly forty-three days after his arrival in Reno. (Report of State Ref. Par. 5, Rec. p. 6.)

6. On March 25, 1944: Rice secured employment at the Reno Army Air Base, Reno, Nevada, and continued at such employment until July 2, 1944, at which time he resigned from said employment. (Rec. p. 145.)

7. A few days before the entry of the divorce decree Rice consulted his attorney for a second time and informed him that he had made application for employment in the government service in Herlong, Cal. (Rec. p. 52.)

8. On June 13, 1944, thirty-two days after service of the divorce complaint on the respondent on May 12, 1944, an ex parte divorce decree was entered by the Nevada court in which action the present respondent did not appear.

9. Immediately after securing his divorce, Rice notified the present petitioner by a code telegram that he had secured his divorce and asked her to come to Reno and marry him. (Rec. p. 174.)

10. The petitioner arrived in Reno on July 3, 1944; and on the same day she and Mr. Rice were married. (Rec. pp. 177, 178.)

11. After their honeymoon Mr. Rice and the Petitioner on July 15, 1944, took up their residence in Herlong, Cal., where Mr. Rice had secured *the employment which he had applied for prior to securing his divorce*, and the parties continued to reside in Herlong, Cal., until Mr. Rice's death on December 23, 1944. (Rec. p. 145.)

12. The petitioner caused to be shipped to Herlong, Cal., certain household furniture which she owned, and after said shipment arrived, said furniture was used to furnish the quarters in which the petitioner and Mr. Rice resided. (Rec. p. 195.)

13. After moving to Herlong, Cal., Rice continued to pay rent for the room which he had previously rented in Reno, Nevada, but *at a reduced rate per week*. (Rec. p. 167.)

14. During the period of Rice's residence in Herlong, Cal., this rented room in Reno was *occupied by others and the door to the same was unlocked*. (Rec. pp. 168-70.)

15. At infrequent intervals Rice and his new wife occupied said rented room in Reno, occasionally on weekends. (Rec. p. 168.)

16. The reason why Rice continued to pay rent for the room in Reno was because he did not know whether his job in Herlong would be permanent, or whether he and his wife would like it there. (Rec. p. 181.)

17. Although Rice and his new wife may have intended to go to Reno at some time in the future if they could find the sort of house that they desired, they never did find "any house there that was available for that sort of thing." (Rec. p. 185.)

To counterbalance the evidence of all of this conduct on the part of Mr. Rice, we are confronted only by a few self-serving declarations which the evidence discloses Rice made to other parties in Reno, all of which statements were made *after he had consulted his Reno attorney and learned the requirements for a Nevada divorce.* If these statements are taken at their face value, they amount to very little and show at best only a possible intention to make a home in Reno some time in the future if circumstances warranted. To Mr. Eddy, a casual friend, he stated that he "*wanted* to make a home in Nevada." (Rec. p. 147.) He stated that he "*intended* to enter business." (Rec. p. 148.) After going to California, he stated to Mr. Eddy that he *planned* to "go back into Reno into business of some kind if possible." (Rec. p. 155.)

Ignoring entirely all evidence of contradictory statements made by Rice before departing for Reno, we have only these few self-serving declarations. The courts everywhere have frequently commented upon weight to be given such statements, particularly in connection with proof of domicil in actions involving divorce

In *Com. Ex-Rel. Meth* vs. *Meth*, 156 Pa. Super, 632, at p. 639, *the Court stated:*

> "Unless the courts are to be reduced to a state of juvenile naivete, they cannot be required to accept self-serving declarations which are wholly at variance with actualities evidenced by the conduct of the party out of whose mouth they came."

This court has expressed itself in forceful language on the same point in *District of Columbia* vs. *Murphy*, 314 U. S. 441. We quote from page 456 of the opinion:

> "One's testimony with regard to his intention is of course to be given full and fair consideration, but is subject to the infirmity of any self-serving declaration and may frequently lack persuasiveness or even be contradicted or negatived by other declarations and inconsistent acts."

Obviously with no contradictory evidence appearing, it is a proper inference from the foregoing facts that Rice's sole motive in going to Nevada was to secure a divorce. Other inferences properly drawn certainly create more than a mere suspicion as to the good faith of Rice's pretended domicil in Nevada.

Without quibbling over the word "indefinite," and assuming that the Nevada court would construe this as synonymous with "permanent," the comment of the court in Mississippi in the case of *Hall* vs. *Hall (Supra)* is pertinent. We quote from page 490 of the opinion in that case:

> "In this connection, it is not inappropriate to say that while the Nevada courts hold that there must be a present intention to remain, if not permanently at least for an indefinite period, they likewise *view with indulgence* the evidence of such intent, but *cannot impose its standards* upon the courts of the State in which the contract of marriage was made and to which it remains always an interested and solicitous party."

When we are confronted with the undisputed fact that Rice, before securing his divorce, told his attorney that he had sought

employment outside of the State of Nevada, coupled with the fact that immediately after his divorce, he secured such employment, what credibility can be given to the statements of a man who, under oath, before the court in Nevada, testified that when he came to Nevada, he intended to reside there for an indefinite period, and then when questioned by the court, "Has that intention been continuously with you since that time" answered "yes," and in response to the court's question, "Is it your present intention," answered "Yes." (Rec. p. 48.)

At the very best, if we take all of Rice's self-serving statements to his Reno acquaintances at their face value, they only show an *intention* to make a home in Nevada at some time *in the future*.

In *Restatement of the Law, Conflict of Laws, Section* 19, we find the following:

> "The intention required for the acquisition of a domicil of choice is an intention to make a home in fact and not an intention to acquire a domicil."

Section 20 reads as follows:

> "For the acquisition of a domicil of choice the intention to make a home must be an intention to make a home *at the moment*, not to make a home *in the future*."

In *Mills* vs. *Mills*, 110 Conn. 612, the court at page 618 uses the following language:

> "The residence of the parties in Nevada with the intention of remaining there permanently after Mills should secure a divorce, *if he could find work*, did not operate to establish for him a domicil in Nevada. This principle is well established."

We have never claimed as petitioner seems to believe, that the employment and residence in California constituted the acquisition of a California domicil, but we do claim that if, as argued by petitioner, these facts are insufficient to support a new domicil in California, the same set of circumstances fail to constitute a new

domicil in Nevada. In other words we contend that it is a fair inference for the court to draw from such a set of facts that as in the cases of *Dalton* vs. *Dalton (supra)* and *Commonwealth* vs. *Berfield (supra)*, the only motive that influenced the decedent in remaining out of Connecticut in a foreign State *after* securing his divorce was profitable *employment in our work* and not domiciliary intent.

In the case of *Esenwein* vs. *Penn*, 325 U. S. 279 the defendant's former home was in Pennsylvania. After going to Reno, Nevada, and securing a divorce, he moved within a month to Cleveland, Ohio, where he was residing at the time of the suit. The Pennsylvania Supreme Court held that this fact alone was sufficient for a prima facie inference that notwithstanding his testimony to the contrary, he had no intention of making his domicil in Nevada. This court, in reviewing the Pennsylvania court's decision, stated that Pennsylvania recognized the burden resting upon the plaintiff. The opinion in that case at page 281 of 325 U. S. used the following language:

> "The Pennsylvania courts have viewed their constitutional duty correctly. It is not for us to retry the facts and we cannot say that in reaching their conclusion the Pennsylvania courts did not have warrant in evidence and did not fairly weigh the facts."

We shall not attempt to review further all of the facts in the case before us, as we can conceive of no better analysis of the significant evidence than is contained in the opinion of the Connecticut Supreme Court of Errors on pages 215 and 216 of the Record.

In the second of the *Williams cases (supra)*, at page 234 of the opinion, it is stated that this court will not upset the judgment of the State court

(1) If it gave proper weight to the claims of power by the foreign State in rendering a judgment.

(2) If the burden of overcoming such respect by disproof of domicil was properly charged against the party challenging the legitimacy of the judgment.

(3) If such issue of fact was left for fair determination by appropriate procedure.

(4) If a finding adverse to the necessary foundation of the foreign State judgment was amply supported in evidence.

We respectfully submit that an examination of the entire Record conclusively shows that the Connecticut Supreme Court of Errors meticulously met all four of these requirements and that its judgment should be affirmed.

Respectfully submitted,

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All italics in this Brief are ours.